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No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, *et al.*,
*Petitioners,*

v.

LEE M. THOMAS, Administrator, United States Environmental Protection Agency,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED

1. Whether this case is one of exceptional importance because it involves the enforceability of EPA findings that acid rain presents a serious threat to the environments of both the United States and Canada.

2. Whether the decision below effectively eliminates a mandatory duty under Section 115 of the Clean Air Act to abate international air pollution by holding that the two EPA determinations which trigger that duty are unenforceable in a citizen suit under Section 304 of that Act unless those determinations are preceded by notice and comment procedures, even though the Clean Air Act and EPA have specified that at least two public comment opportunities will be provided at subsequent stages of those proceedings before any pollution control measures become effective.

3. Whether the decision below conflicts with *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), by engrafting procedural requirements on a federal statute in excess of those mandated by Congress in the Clean Air Act and the Administrative Procedure Act.

## PARTIES TO THE PROCEEDING

The appellants in the court of appeals were Lee M. Thomas, Administrator, U.S. Environmental Protection Agency, Commonwealth of Kentucky, State of Ohio, State of West Virginia, National Coal Association, Alabama Power Company, Appalachian Power Company, Arkansas Power & Light Company, Baltimore Gas and Electric Company, Boston Edison Company, Carolina Power & Light Company, Central and South West Corporation, Central Power and Light Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, West Texas Utilities Company, Central Hudson Gas & Electric Corporation, Central Illinois Light Company, Central Illinois Public Service Company, The Cleveland Electric Illuminating Company, Columbus and Southern Ohio Electric Company, Commonwealth Edison Company, Consolidated Edison Company of New York, Inc., Consumers Power Company, The Dayton Power & Light Company, Delmarva Power & Light Company, The Detroit Edison Company, Duke Power Company, Florida Power Corporation, Florida Power & Light Company, Georgia Power Company, Gulf Power Company, Gulf States Utilities Company, Houston Lighting & Power Company, Illinois Power Company, Indiana & Michigan Electric Company, Indianapolis Power & Light Service Company, Kansas City Power & Light Company, Kentucky Power Company, Kentucky Utilities Company, Louisiana Power & Light Company, Madison Gas and Electric Company, Mississippi Power Company, Mississippi Power & Light Company, Monongahela Power Company, Montaup Electric Company, New England Power Company, New Orleans Public Service, Inc., Northern Indiana Public Service Company, Pennsylvania Power Company, Ohio Power Company, Ohio Valley Electric Corporation, Oklahoma Gas and Electric Company, Pennsylvania Electric Company, Pennsylvania Power & Light Company, The Potomac Edison Company, Potomac

Electric Power Company, Public Service Company of Indiana, Inc., Public Service Electric and Gas Company, Salt River Project, Southern California Edison Company, Tampa Electric Company, Texas Utilities Electric Company, Toledo Edison Company, Tucson Electric Power Company, Union Electric Company, Virginia Electric and Power Company, Wisconsin Power and Light Company, Wisconsin Public Service Corporation, the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association.

The appellees were State of New York, State of Maine, State of Vermont, Commonwealth of Massachusetts, State of Rhode Island, State of Connecticut, Commonwealth of Pennsylvania, State of New Hampshire, State of New Jersey, Natural Resources Defense Council, Sierra Club, National Wildlife Federation, National Audubon Society, Honorable Richard Ottinger, Robert and Janet Townsend, Ellen Edith Desmond, Her Majesty the Queen in Right of Ontario, Ian G. Scott, Q.C., Attorney General for Ontario, James Bradley, Minister of the Environment for the Province of Ontario, and Michael B. Vaughan.

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Petitioners Her Majesty the Queen in Right of Ontario, Ian G. Scott, Q.C., Attorney General for Ontario, James Bradley, Minister of the Environment for the Province of Ontario, and Michael B. Vaughan respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 802 F.2d 1443 (D.C. Cir. 1986) and appears as Appendix A hereto. The opinion and order of the district court granting plaintiffs' motion for summary judgment are reported at 613 F. Supp. 1472 (D.D.C. 1985) and appear as Appendices E and F hereto.

## JURISDICTION

The judgment of the court of appeals was entered on September 18, 1986 (Appendix B). Timely petitions for rehearing and rehearing *en banc* were denied on November 24, 1986 (Appendices C, D). Jurisdiction over plaintiffs' complaint is conferred by 42 U.S.C. 7604(a)(2). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

This case involves several sections of the Clean Air Act, 42 U.S.C. 7401, *et seq.* Section 115 of that Act, 42 U.S.C. 7415, provides:

> (a) Whenever the Administrator, upon receipt of reports, surveys, or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country or whenever the Secretary of State requests him to do so with respect to such pollution which the Secretary of State alleges is of such a nature, the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.
>
> (b) The notice of the Administrator shall be deemed to be a finding under section 7410(a)(2)(H)(ii) of this title which requires a plan revision with respect to so much of the applicable implementation plan as is inadequate to prevent or eliminate the endangerment referred to in subsection (a) of this section. Any foreign country so affected by such emission of pollutant or pollutants shall be invited to appear at any public hearing associated with any revision of the appropriate portion of the applicable implementation plan.
>
> (c) This section shall apply only to a foreign country which the Administrator determines has given

the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by this section.

Section 110(a)(2)(H)(ii) of that Act, 42 U.S.C. 7410(a)(2)(H)(ii), provides:

> (a)(2) * * * The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—
>
> (H) it provides for revision, after public hearings, of such plan * * * (ii) * * * whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate * * * to otherwise comply with any additional requirements established under [this Act].

Section 110(a)(3)(A) of the Act, 42 U.S.C. 7410(a)(3)(A), provides:

> The Administrator shall approve any revision of an implementation plan * * * if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

Section 110(c)(1) of that Act, 42 U.S.C. 7410(c)(1), provides:

> (1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—
>
> (A) the State fails to submit an implementation plan which meets the requirements of this section, (B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or (C) the State fails, within 60 days after notification by the Administrator or such longer period as he may

> prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.
>
> If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation.

Section 307(d) of the Act, 42 U.S.C. 7607(d), provides:

> (1) This subsection applies to—
>
> * * * *
>
> (B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,
>
> * * * *
>
> (3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment * * *.

Section 304(a) of the Act, 42 U.S.C. 7604(a), provides:

> [A]ny person may commence a civil action on his own behalf—
>
> * * * *
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator * * *.

## STATEMENT OF THE CASE

On January 13, 1981, the Administrator of the Environmental Protection Agency, Douglas M. Costle, sent a letter to Secretary of State Edmund S. Muskie in which he concluded that "acid deposition is endangering public welfare in the U.S. and Canada and * * * U.S.

and Canadian sources contribute to the problem not only in the country where they are located but also in the neighboring country." The issue presented in this case is whether these findings imposed a non-discretionary duty on EPA to initiate a rule-making proceeding under Section 115 of the Clean Air Act to identify the states in which the pollution responsible for acid deposition originates and to order those states to abate the emissions, even though notice and public comment on those findings had not been provided under the Administrative Procedure Act.

1. *The Statutory Framework.* In Section 115, Congress carefully crafted a remedial framework for international air pollution problems. Subsections (a), (b), and (c) of that Section establish a three-step procedure for addressing such problems.

In the first step, which is defined in the first phrase of subsection (a) and in subsection (c), the Administrator makes two discretionary determinations—a factual determination of endangerment to a foreign country and a legal determination that the U.S. and the foreign country grant each other reciprocal rights concerning transboundary air pollution. Subsection (a) defines the threshold level of endangerment necessary to trigger agency action. It is sufficient if the Administrator "has reason to believe that any air pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country."[1] Subsection (c) defines the reciprocity requirement. It provides that subsection (a) is applicable only if the endangered foreign country is one "which the Administrator determines has

[1] Subsection (a) also provides that the Administrator's belief must be based either on the "receipt of reports, surveys or studies from any duly constituted international agency" or upon an allegation by the Secretary of State.

given the United States essentially the same rights with respect to the prevention and control of air pollution occurring in that country as is given that country by this section."

In the second step, once the Administrator exercises his discretion and makes these two factual and legal determinations, the second phrase of subsection (a) provides that he "shall give formal notification thereof to the Governor of the State in which such emissions originate." This language is mandatory and unequivocal.

The language chosen by Congress to describe step one and step two has an important difference. Under step one, the issue is whether the Administrator has "reason to believe" that endangerment exists. There is no statutory requirement that the Administrator's belief be expressed in written form or communicated to anyone. The Administrator need not make any formal finding of endangerment.

In contrast, under step two, "formal notification" is required when the Administrator acts on his belief by sending notices to governors of the states in which the offending emissions originate. The difference between the "reason to believe" standard in step one and the "formal notification" requirement in step two indicates that Congress anticipated that the Administrator could arrive at his endangerment determination without following any formal procedures.

The third step is defined in subsection (b), which provides that the notice issued by the Administrator in step two "shall be deemed to be a finding" that the offending state's State Implementation Plan (SIP) under the Clean Air Act is inadequate and must be revised "to prevent or eliminate the endangerment." The SIP revision process is set forth in Sections 110(a)(2)(H)(ii) and 110(a)(3)(A), which provide that the State must provide a public hearing on any proposed revision, and that EPA

shall then approve such revision if it meets the statutory requirements and "has been adopted by the State after reasonable notice and public hearings." The SIP revision process is further set forth in Sections 110(c)(1), 307(d)(1)(B) and 307(d)(3), which provide that, if EPA determines that the State's proposed revision is untimely, substantively inadequate, or procedurally improper, EPA must provide a public hearing and follow the notice and comment procedures in Section 553(b) of the Administrative Procedure Act before approving its own revision of a State's SIP. Thus, before any revised SIP can become effective and before any emission control requirements can be imposed on anyone, the public must receive notice, an opportunity for comment, and a public hearing on a proposed SIP revision.

2. *The EPA Determinations.* On January 13, 1981, former Administrator Costle stated in a letter to former Secretary of State Muskie that he had reviewed an October 1980 report by the International Joint Commission (App. E, *infra*, 43a).[2] Costle concluded that this report "confirms that acid deposition is endangering public welfare in the United States and Canada and that United States and Canadian sources contribute to the problem not only in the country where they are located but also in the neighboring country" (*ibid.*). In a letter to Senator Mitchell attached to the Muskie letter, Costle elaborated on this conclusion and stated that "we can say with some certainty that emission sources in the United States contribute significantly to the atmospheric loadings over some sensitive areas in Canada * * *" (*id.* at 46a). In the Muskie letter, Costle also concluded that recently enacted Canadian legislation "provides the

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[2] The IJC is an international agency established by the governments of Canada and the United States in the Boundary Waters Treaty of 1909. 36 Stat. 2448. It has the responsibility for advising the two nations regarding matters affecting the quality of the Great Lakes ecosystem.

Government of Canada with authority to give the United States essentially the same rights as Section 115 gives to Canada" (*id.* at 39a).

Administrator Costle's intent to trigger Section 115 is demonstrated by his statement in the Mitchell letter that his conclusions were "adequate to warrant the intention of a Section 115 based plan revision process in appropriate States" and that he had instructed his staff "to develop recommendations regarding the States which should receive formal notification" (App. E, *infra*, 52a). Similarly, in a press release issued three days after the Muskie and Mitchell letters, Administrator Costle stated that his conclusions "are adequate to warrant the initiation of Section 115" (Pl. Ex. G, p. 3).

Despite these conclusions, Administrator Costle's successors at EPA did not take any further action under Section 115. Consequently, after sending the notice of intent to sue required by the Act, several eastern states, environmental groups and U.S. citizens filed suit against EPA under Section 304(a)(2) of the Act, 42 U.S.C. 7604(a)(2), which provides that "any person may commence a civil action on his own behalf * * * against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this [Act] which is not discretionary with the Administrator." Plaintiffs contended that the Costle determinations imposed a mandatory duty on EPA to identify the states responsible for acid deposition and to issue SIP revision notices to them.

3. *The District Court Decision.* The district court held that "Administrator Costle properly invoked Section 115 of the Clean Air Act" and that it "is incumbent upon the current EPA Administrator to 'give formal notification' to the Governors of the states in which the harmful emissions originate and to set in motion the necessary processes to require a plan revision so as to prevent or eliminate the endangerment encompassed by the

Costle determinations" (App. E, *infra*, 38a). In reaching this conclusion, the court found the Costle correspondence constituted official agency action under the Clean Air Act, but that the action was not a rule or policy statement under the Administrative Procedure Act. *Id.* at 34a. The court noted that "correspondence is frequently used by EPA to take formal action under the Clean Air Act." *Id.* at 34a, n. ** (citing *Harrison v. PPG Industries*, 446 U.S. 578, 582 (1980)).

The district ordered EPA to issue SIP revision notices within 180 days after the agency issued a current reciprocity determination (App. F, *infra*, 55a).[3] EPA moved to modify this order to allow additional time for implementation. In a supporting affidavit, EPA's Acting Assistant Administrator of the Office of Air and Radiation stated that issuance of SIP revision notices would first require EPA analysis of how emission reduction obligations should be allocated among the states, and that these "results will only be acceptable to those who would be bound by them if they are developed with a full opportunity for public comment, and will only be legally binding if they are promulgated as rules" (App. G, *infra*, 65a). He further stated that "it is certain that each step of EPA's reasoning and analysis in deriving allocation levels will be subject to detailed public comment" (*ibid.*). Thus, EPA committed itself to provide a second opportunity for public comment prior to the opportunity available later in the SIP revision process.

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[3] Because it was concerned about the "lengthy passage of time since the [first] determination was made," the district court granted EPA's current Administrator, Lee M. Thomas, an opportunity "to determine whether Costle's conclusion remains viable" (App. E, *infra*, 33a). On October 22, 1985, Administrator Thomas issued a new reciprocity determination which essentially reaffirmed the Costle determination.

4. *The Court of Appeals Decision.* On appeal, EPA did not challenge the district court's conclusion that Administrator Costle had made the necessary endangerment and reciprocity determinations. EPA admitted that Costle "point[ed] out the existence of a general transboundary flow of pollutants across the United States-Canada border, leading to adverse effects in both countries." EPA Brief, p. 20. EPA also admitted that "at this time," the reciprocity requirements in Section 115 (c) "have been met." *Id.* at 19, n. 6.

Nevertheless, the court of appeals held that those determinations were unenforceable under Section 304 (App. A, *infra*). The court found that those determinations were rules under Section 551(4) of the APA and could not be promulgated without first complying with the notice and comment procedures under Section 553 of the APA (*id.* at 7a). The court stated that Section 304 could therefore not be used to compel EPA to issue notices to the responsible states under Section 115 (*id.* at 9a).

In reaching this conclusion, the court of appeals did not find that the Costle determinations were rules because they had an immediate effect on anyone outside EPA. Instead, it found that they would be rules if, as plaintiffs claimed, they "bound subsequent EPA Administrators to issue SIP revision notices" (*id.* at 7a). The court indicated that an agency statement can be a rule even if it has no impact on private parties (*id.* at 7a, n. *).

The court next considered whether the Costle determinations were the type of rule exempted by Section 553(b)(A) of the APA from notice-and-comment procedures, such as a general statement of policy or a procedural rule. The court found that the Costle determinations are "none of these" because they " 'jeopardize[],' * * * or 'substantially affect' * * * the rights of pri-

vate parties" (App. A, *infra*, 7a-8a). The court found that while those effects "are not yet certain," it was sufficient that plaintiffs had claimed that the Costle determinations "*forced* the EPA to take direct and substantial regulatory actions" (emphasis in original) and that these actions would "ultimately caus[e] the termination or restriction of the operations of many utilities and manufacturers" (*id.* at 8a).

## REASONS FOR GRANTING THE PETITION

### I. THIS CASE IS ONE OF EXCEPTIONAL IMPORTANCE BECAUSE OF ITS ENORMOUS POTENTIAL IMPACT ON ENVIRONMENTAL QUALITY IN EASTERN NORTH AMERICA

This case is one of exceptional importance. At issue are the effect and enforceability of EPA's 1981 finding that "acid deposition, often referred to as acid rain, presents a genuine threat to our environmental well-being both in the U.S. and Canada" (App. E, *infra*, 45a). Former Administrator Costle's letter stated that some areas of Ontario "are among the most heavily impacted areas in the world" because of acid precipitation (*id.* at 47a).

These findings are as valid today as they were in 1981. At their Quebec Summit in March 1985, President Reagan and Prime Minister Mulroney each appointed special envoys to examine the acid rain issue. EPA Brief, *supra*, Addendum A, p. 5. According to the envoys' January 1986 final report, the "two most important things [they] learned" were that "[a]cid rain is a serious environmental problem in both the United States and Canada" and that "[a]cid rain is a serious transboundary problem." *Id.* at 7-8. At their Washington Summit in March 1986, President Reagan stated that he "endorses fully

the Joint Report of the Special Envoys." Ontario Brief, Addendum C, p. 1.[4]

It has now been over nine years since Congress enacted Section 115 in its present form as the only statutory remedy for international air pollution problems. It has been over six years since acid rain was officially recognized by EPA as an endangerment to public health and the environment within the meaning of that Section.

Nevertheless, EPA has not initiated any administrative proceedings under that Section to control this critical problem. As a result of the court of appeals' decision below, citizen efforts to compel such proceedings under Section 304 have been negated.

The present case offers the only opportunity for a court to review the applicability of Section 115 to the effect of acid rain on Canada. If that review should result in an order compelling EPA to initiate the Section 115 process, it could have an enormous beneficial impact on environmental quality in eastern North America. This fact alone is a sufficient reason to grant the petition for a writ of certiorari in this case.

## II. THE DECISION BELOW EFFECTIVELY ELIMINATES A MANDATORY DUTY UNDER THE CLEAN AIR ACT BY CREATING REDUNDANT PROCEDURAL PREREQUISITES TO CITIZEN ENFORCEMENT OF THAT DUTY

As we have shown above, EPA has completed step one of the three-step procedure established in Section 115 of the Clean Air Act for addressing transboundary air pol-

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[4] The present case is not nonjusticiable because it concerns foreign relations. In *Japan Whaling Ass'n v. American Cetacean Society*, 106 S.Ct. 2860, 2865-2866 (1986), this Court recently reaffirmed the judicial responsibility to interpret the scope of agency duties under federal statutes even though the requested relief "may have significant political overtones," such as the repudiation of an international agreement.

lution problems. Indeed, EPA did not deny below that it has made both the endangerment and reciprocity determinations specified by Congress under step one.

Once EPA has made these determinations, step two of the Section 115 process dictates that EPA "shall give formal notification thereof" to the responsible states. This language is mandatory and unequivocal.

Section 304 authorizes citizens to enforce such duties. It provides that citizens may bring suit to compel EPA to carry out "any act or duty under this Act which is not discretionary with the Administrator." This provision is clearly intended to address situations in which EPA has failed to act pursuant to a Congressional mandate. In such situations, the agency's inaction may well be in an uncompleted form. Yet, Congress decided that citizens should be able under Section 304 to force the agency to complete the process.

Under the court of appeals' decision, however, an agency's inaction "cannot serve as a basis for judicial relief" under Section 304 (App. A, *infra*, 6a) unless the duty to be compelled arises from an agency rule promulgated after APA notice and comment rulemaking procedures. If such a principle is established, Section 304 will be eliminated as the basis for enforcing a duty imposed directly by Congress under Section 115 and many other provisions of the Act. EPA will be able to escape any mandatory duty imposed by the Act simply by failing to carry out the APA notice and comment procedures imposed by the court of appeals. The command of Congress in the Clean Air Act will not be sufficient to require EPA action.

There is no basis in the Clean Air Act for this result. As EPA stated in the district court in its memorandum in opposition to plaintiffs' motion for summary judgment (p. 28), "Section 115 does not specify a procedure for the Administrator to determine and announce his findings." On the other hand, Congress did specify in Sections 110

(a)(2)(H) and 307(d)(3) that, before any SIP revision resulting from such findings has an effect on anyone, the State must hold a public hearing on the proposed revision, and if the State's procedures or its proposal are determined by EPA to be inadequate, EPA must then follow the notice and comment procedures under Section 553(b) of the APA in preparing its own revision for the State. Furthermore, EPA informed the district court below that, before the states could even begin the SIP revision process, EPA would provide an opportunity for public comment on "each step of EPA's reasoning and analysis" in preparing notices to the states under Section 115(a) (App. G, *infra*, 65a). Thus, there would be at least two opportunities for public comment before any emission control requirements could go into effect to remedy the endangerment from acid rain.

According to the court of appeals, however, the APA demands an additional opportunity for public comment at an even earlier stage of the administrative process. We submit that this holding is erroneous for two reasons.

First, it strains credulity to believe that, although Congress expressly stated in the Clean Air Act exactly when public hearing and APA notice and comment procedures should apply, it also intended to have them apply at an earlier stage in the same rulemaking process despite its total silence in the statute and its legislative history concerning such a requirement. It is especially difficult to believe that Congress intended these procedures to apply during step one when the Administrator only has "reason to believe" certain facts, prior to step two when Congress directed "formal notification" to the states of those facts. This choice of language strongly indicates that Congress intended that the Administrator could make his step one determinations without following formal notice and comment procedures.

If the court of appeals' decision were correct, EPA would have to conduct rulemakings even to issue intra-

agency memoranda under many of the environmental statutes it administers.[5] For example, if the Administrator issued an intra-agency memorandum stating that he intended to list a substance as a hazardous air pollutant under Section 112 of the Act, 42 U.S.C. 7412, a rulemaking proceeding would be required, since such an intent would trigger the Administrator's duty under Section 112(b)(1)(A) to publish such a finding and under Section 112(b)(1)(B) to propose regulations establishing emission standards for such a pollutant. Yet Section 112(b)(1)(B) expressly provides that rulemaking procedures, including notice of a public hearing, shall follow publication of the proposed regulations, not the Administrator's statement of his intent to list a hazardous air pollutant.

Second, the threshold Costle determinations are not "rules" within the meaning of Section 551(4) of the APA. To be a rule, an agency statement must have "general or particular applicability and future effect." 5 U.S.C. 551(4). The Costle determinations have neither. They are not applicable to anyone and do not impose any duties on anyone. No polluter need take any action to clean up its emissions. No state need revise its SIP. Any effects will be felt, if at all, only after notices are issued to the states. And EPA says it will provide notice and comment before that step is taken. Consequently, the Costle determinations were simply the first step in the process leading to a rule.

The court of appeals reasoned that the Costle determinations were rules because, according to plaintiffs' claim, they bound subsequent Administrators to take regu-

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[5] As petitioner State of New York has demonstrated in its parallel petition for certiorari in this case, endangerment determinations similar to Section 115 are found in other sections of the Clean Air Act, as well as in the Clean Water Act, the Resource Conservation and Recovery Act, the Toxic Substances Control Act, the Safe Drinking Water Act, the Surface Mining Control and Reclamation Act, and the Food and Drug Act.

latory actions. This formulation is clearly erroneous. By themselves, the Costle determinations are not binding on anyone, not even subsequent Administrators. They are only objective facts found by the agency. They do not commit EPA to take any further action. The binding effect arises solely from Section 115 of the Clean Air Act. Under that Section, once the necessary findings occur, a binding duty to issue SIP notices arises from the Clean Air Act itself.

In this sense, then, the only necessary and relevant binding effect is that created by Section 115. This binding effect is one of Congressional, not administrative, origin. Former Administrator Costle did not create it. It therefore makes no sense to require such a Congressionally-created "rule" to be preceded by public notice and comment. Congress' procedures are more than adequate to satisfy the policy of public participation in the APA.

Moreover, subsequent Administrators are not bound to follow the Costle determinations. As we have noted above, the district court offered the current Administrator a chance to reconsider the reciprocity determination, but he reaffirmed its validity. Similarly, the current Administrator could change his mind concerning the endangerment determination, if the record supported such a change. However, he has chosen not to do so. Furthermore, as we have seen, the endangerment and reciprocity determinations would be subject to public comment and agency reconsideration during at least two subsequent stages in the Section 115 process.

Consequently, by holding that the binding effect created by Section 115 must be preceded by notice and comment, the court of appeals effectively eliminated the mandatory duty established by that Section. Citizens cannot enforce that duty unless the Administrator has first complied with redundant notice and comment procedures. Because this result essentially negates citizen enforcement of manda-

tory duties created by the Clean Air Act and numerous other important environmental statutes, this Court should grant the petition for a writ of certiorari to review this issue.

## III. THE DECISION BELOW CONFLICTS WITH *VERMONT YANKEE NUCLEAR POWER CORP. v. NRDC*

In *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 525 (1978), this Court "caution[ed] reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." The Court stated that Section 553 of the APA generally "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." *Id.* at 524.

The decision below conflicts with these principles. As we have shown above, the agency entrusted with administering the Clean Air Act has determined that Section 115 does not specify any procedures for making the determinations in step one under that Section. In addition, Congress has specified in Section 307(d)(3) that Section 553 of the APA applies to EPA proceedings under step three of Section 115.

*Vermont Yankee* holds that "agencies should be free to fashion their own rules of procedure." 435 U.S. at 544. The court may not "stray beyond the judicial province * * * to impose upon the agency its own notion of which procedures are 'best.'" *Id.* at 549. We submit that this is especially so when the court-imposed procedure provides a totally unnecessary third opportunity for notice and comment.

## CONCLUSION

We respectfully submit that the petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit should be granted.

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February 1987

# APPENDICES

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 85-5970

LEE M. THOMAS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
AND ALABAMA POWER COMPANY, *et al.*,
*Appellants*

v.

STATE OF NEW YORK, *et al.*

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No. 85-5972

LEE M. THOMAS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
AND ALABAMA POWER COMPANY, *et al.*,
*Appellants*

v.

STATE OF NEW YORK, *et al.*

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No. 85-5994

LEE M. THOMAS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
AND NATIONAL COAL ASSOCIATION,
*Appellants*

v.

STATE OF NEW YORK, *et al.*

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No. 85-6113

LEE M. THOMAS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
AND COMMONWEALTH OF KENTUCKY,
*Appellants*

v.

STATE OF NEW YORK, *et al.*

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No. 85-6114

LEE M. THOMAS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
AND STATE OF OHIO,
*Appellants*

v.

STATE OF NEW YORK, *et al.*

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Appeals from an Order of the United States
District Court for the District of Columbia

(Civil Action No. 84-853)

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Argued May 15, 1986

Decided September 18, 1986

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Before MIKVA and SCALIA, Circuit Judges, and WRIGHT, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge SCALIA.

SCALIA, Circuit Judge:

On January 13, 1981, Douglas M. Costle, at the time Administrator of the Environmental Protection Agency, sent a letter to then Secretary of State Edmund S. Muskie in which he concluded that "acid deposition is endangering public welfare in the U.S. and Canada and . . . U.S. and Canadian sources contribute to the problem not only in the country where they are located but also in the neighboring country." This appeal requires us to decide whether, under § 115 of the Clean Air Act, 42 U.S.C. § 7415 (1982), Administrator Costle's letter legally obligated his successors to identify the states in which pollution responsible for acid deposition originates and to order those states to abate the emissions.

I.

Subsection (a) of § 115 of the Clean Air Act, as amended by the Clean Air Act Amendments of 1977, Pub.L. No. 95-95, 91 Stat. 685, 710 (codified at 42 U.S.C. § 7415(a) (1982)) provides:

> Whenever the [EPA] Administrator, upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country . . . the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.

Subsection (b) provides that the "formal notification" issued under subsection (a) shall operate to force each state to revise as much of its state implementation plan (SIP) as is "inadequate to prevent or eliminate the en-

dangerment referred to in subsection (a)." (SIP's impose controls upon individual polluters within each state sufficient to ensure that national ambient air quality standards are met.) Finally, subsection (c) makes subsections (a) and (b) applicable only if the endangered foreign country is one "which the Administrator determines has given the United States essentially the same rights with respect to the prevention and control of air pollution occurring in that country as is given that country by this section."

On January 13, 1981, only days before President Reagan took office, outgoing EPA Administrator Costle wrote to then Secretary of State Muskie to express his belief that pollution emitted in the United States was at least partially responsible for acid deposition endangering public welfare in Canada. Acid deposition—often referred to as "acid rain"—is believed to occur when certain pollutants are transported through the atmosphere and chemically altered by atmospheric processes before being deposited in either dry or wet form. Administrator Costle based his "endangerment" finding on a report issued by the International Joint Commission, concededly a "duly constituted international agency" for purpose of § 7415(a). In his letter, Administrator Costle also concluded that newly enacted legislation authorized the Canadian government to provide the United States with essentially the same rights as the United States affords Canada under the Clean Air Act, although he recognized that this "reciprocity" finding "could be changed should the U.S. conclude that future Canadian actions interpreting or implementing their legislation were not giving essentially the same rights to the U.S." Administrator Costle sent a similar letter to Senator George Mitchell of Maine and announced his findings in a press release. No advance notice of Administrator Costle's actions was given, no comments were solicited, and neither the letters nor the findings were published in the Federal Register.

Administrator Costle's successors at the EPA did not regard his actions as sufficient to trigger any mandatory action under § 7415. Consequently, several eastern states, national environmental groups, American citizens who own property in eastern Canada, and a Congressman sued the EPA in the United States District Court for the District of Columbia pursuant to the Clean Air Act's "citizen suit" provision, 42 U.S.C. § 7604(a)(2), which provides that "any person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this [Act] which is not discretionary with the Administrator." The plaintiffs argued that the Costle letters imposed upon the current EPA Administrator a duty to identify the states responsible for acid deposition and to issue SIP revision notices to them.

The District Court agreed. *New York v. Thomas*, 613 F. Supp. 1472, 1481-86 (D.D.C. 1985). The court was not troubled by the EPA's argument that identifying *which* states to notify would be time consuming, costly and perhaps impossible; the Court simply stated that "the obligation to identify the polluting states is incidental to giving formal notification." *Id.* at 1484 n.*. Likewise, the Court was untroubled that Administrator Costle made his findings in private correspondence, without notice, opportunity for comment, or publication in the Federal Register. The Court remarked that the EPA frequently uses correspondence to take "formal action" under the Clean Air Act, *id.* at 1484 n.**, and stated that publication of the Costle findings in the Federal Register "would be inappropriate for this kind of action because it is not a rule or policy statement," *id.* at 1484. The court ordered the EPA to reassess Administrator Costle's "reciprocity" finding and, if it remained accurate, to issue SIP revision notices within 180 days thereafter. On October 22, 1985, the current EPA Ad-

ministrator found that reciprocity continues to exist between the United States and Canada. The District Court then stayed its order to permit the EPA to bring this appeal. We have jurisdiction under 28 U.S.C. § 1291 (1982).

## II

This case involves an unusual statute executed in an unexpected manner. On its face, § 7415 requires an EPA Administrator who has reason to believe in the existence of an international air pollution problem to issue SIP revision notices to "*the* Governor" of "*the* State" responsible for it. In the context of a complex, multi-source pollution problem like acid deposition, identification of the problem does not necessarily bring with it identification of the blameworthy states. Had the statute been executed as Congress probably anticipated, the present suit would not have arisen. Notice of the "endangerment" and "reciprocity" findings would have been issued at the same time as the proposed SIP revision notices, comment would have been taken on both, and both would have been published in final form in the Federal Register. *Cf. National Asphalt Pavement Ass'n v. Train*, 589 F.2d 775, 778 (D.C. Cir. 1976) ("*National Asphalt*") (finding that particular category of stationary source was "significant contributor" to air pollution issued simultaneously with proposed standards of performance whose issuance was triggered by such finding). Because Administrator Costle chose to issue the "endangerment" and "reciprocity" findings before attempting to identify the culpable states, however, we must determine appellants' claim that the findings legally bind the current Administrator to issue SIP notices. We conclude that, whatever the impact of Administrator Costle's letter, it cannot serve as a basis for judicial relief.

Section 551(4) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551(4) (1982), defines "rule" as "the whole or a part of an agency statement of general

or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." Clearly, an agency statement that bound subsequent EPA Administrators to issue SIP revision notices would be a statement of "future effect designed to implement . . . law or policy" * and thus a rule. It requires notice-and-comment procedures, therefore, unless it comes within one of the APA's exceptions for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). The statement in the present case is none of these. The findings of "endangerment" and "reciprocity" are not an interpretative rule because they are not a "statement interpreting an existing statute or rule," *Batterton v. Marshall*, 648 F.2d 694, 705 (D.C. Cir. 1980); *see also Cabais v. Egger*, 690 F.2d 234, 237-38 (D.C. Cir. 1982); *Guardian Federal Savings & Loan Ass'n v. FSLIC*, 589 F.2d 658, 664 (D.C. Cir. 1978) ("*Guardian Federal*"); *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir.

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* Both appellants and appellees labor under the misconception that the classification of an agency statement as a *rule* depends upon whether it substantially affects the interests of private parties. While language in past decisions of this court is somewhat misleading on the point, *see Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 814-15 (D.C. Cir. 1983); *Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 1254-55 (D.C. Cir. 1980), other decisions, *see e.g., Batterton v. Marshall*, 648 F.2d 694, 704-08 (D.C. Cir. 1980); *Department of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1150 & n.5 (5th Cir. 1984), and the APA itself make clear that the impact of an agency statement upon private parties is relevant only to whether it is the *sort* of rule that is a rule of procedure, *see National Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205, 103 S.Ct. 1193, 75 L.Ed.2d 438 (1983), or a general statement of policy, *see Cabais v. Egger*, 690 F.2d 234, 237 (D.C. Cir. 1982), and thus does not require notice and comment, not to whether it is a rule at all. Indeed, the APA expressly includes within the definition of rule "an agency statement . . . describing the organization . . . of an agency"—a statement that can rarely if ever have effect outside of the agency itself. 5 U.S.C. § 551(4).

1952). They are not a "general statement of policy" for (on the assumption that they bind subsequent Administrators to action) they do more than express, without the "force of law," the EPA's "tentative intentions for the future." *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974). They are not a rule of "agency organization, procedure, or practice" because they "go[] beyond formality," *Pickus v. Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974), and "jeopardize[]" *Batterton*, 648 F.2d at 708, or "substantially affect," *National Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 950 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205, 103 S.Ct. 1193, 75 L.Ed.2d 438 (1983), the rights and interests of private parties. The fact that it is not yet certain which particular states will receive SIP notices as a result of the findings, and which particular dischargers within those states will suffer injury, may be relevant to the question of when legal challenge to the findings would be *ripe*, but does not convert them into a mere general statement of policy or a procedural rule. We conclude that if Administrator Costle's findings left the EPA no alternative but to issue SIP notices ultimately causing the termination or restriction of the operations of many utilities and manufacturers—if they *forced* the EPA to take direct and substantial regulatory actions—they could not be promulgated without notice-and-comment procedures.

Confirmation of this view is contained in *National Asphalt*, which held that an EPA Clean Air determination similar to the findings involved here was a rule that required notice-and-comment procedures. At issue in that case was the designation of a particular industry for inclusion on the list of stationary sources which "may contribute significantly to air pollution which cause or contributes to the endangerment of public health or welfare." 42 U.S.C. § 1857c-6(b)(1)(A) (1970). Within 120 days after such designation, the Administrator was obligated to publish proposed standards of performance for mem-

bers of that industry. 42 U.S.C. § 1857c-6(b)(1)(B). We held that notice and comment was required *on the designation. National Asphalt*, 539 F.2d at 779 n. 2.

Appellees urge that a contrary result is demanded by *Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 1254-56 (D.C.Cir.1980) (*"Costle"*), which held that a settlement modification requiring the EPA to take certain investigatory actions was not a rule. *Costle*, however, like the cases upon which it relied, rests upon "a classification—of investigative acts—that is set apart from either adjudication or rulemaking." *Guardian Federel*, 589 F.2d at 663. No similar "investigative acts" are at issue in this case.

We need not address appellants' remaining arguments to the point that, even if the *Costle* findings *had* been published only after notice and comment, they would nevertheless be insufficient to support the present suit. It suffices to say that, because the findings were issued without notice and comment, they cannot be the basis for the judicial relief appellees seek. How and when the agency chooses to proceed to the stage of notification triggered by the findings is within the agency's direction and not subject to judicial compulsion.

* * * * * *

We reverse and remand to the District Court with instructions to dismiss.

*So ordered.*

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1986

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No. 85-5970

LEE M. THOMAS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
and ALABAMA POWER COMPAY, *et al.*,
*Appellants*

v.

STATE OF NEW YORK, *et al.*

Civil Action No. 84-853

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No. 85-5972

LEE M. THOMAS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
and ALABAMA POWER COMPAY, *et al.*,
*Appellants*

v.

STATE OF NEW YORK, *et al.*

Civil Action No. 84-853

---

No. 85-5994

LEE M. THOMAS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
and NATIONAL COAL ASSOCIATION,
*Appellants*

v.

STATE OF NEW YORK, *et al.*

Civil Action No. 84-853

---

No. 85-6113

LEE M. THOMAS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
and COMMONWEALTH OF KENTUCKY,
*Appellants*

v.

STATE OF NEW YORK, *et al.*

Civil Action No. 84-853

---

No. 85-6114

LEE M. THOMAS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
and STATE OF OHIO,
*Appellants*

v.

STATE OF NEW YORK, *et al.*

Civil Action No. 84-853

---

Appeals from an Order of the
United States District Court
for the District of Columbia

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[Filed Sept. 18, 1986]

Before: MIKVA and SCALIA, *Circuit Judges*, and WRIGHT, *Senior Circuit Judge*.

JUDGMENT

These causes came on to be heard on the records on appeal from an order of the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in these causes is hereby reversed and these cases are remanded with instructions, in accordance with the Opinion for the Court filed herein this date.

*Per Curiam*

FOR THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: September 18, 1986
Opinion for the Court filed by Circuit Judge Scalia.

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1986

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No. 85-5970

STATE OF NEW YORK, *et al.*

v.

LEE M. THOMAS, ADMINISTRATOR,
U.S. ENVIRONMENTAL PROTECTION AGENCY

---

And Consolidated Cases

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CA No. 84-00853

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[Filed Nov. 24, 1986]

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Before: MIKVA, *Circuit Judge* and WRIGHT, *Senior Circuit Judge*

ORDER

Upon consideration of the petitions for rehearing of petitioners and of the State of Maine and Her Majesty the Queen in Right of Ontario, filed November 3, 1986, it is

ORDERED, by the Court, that the petitions are denied.

*Per Curiam*

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1986

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No. 85-5970

STATE OF NEW YORK, *et al.*

v.

LEE M. THOMAS, ADMINISTRATOR,
U.S. ENVIRONMENTAL PROTECTION AGENCY

---

And Consolidated Cases

---

CA No. 84-00853

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[Filed Nov. 24, 1986]

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Before: WALD, *Chief Judge*; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D. H. GINSBURG, *Circuit Judges*; WRIGHT, *Senior Circuit Judge*

ORDER

The suggestions for rehearing *en banc* of petitioners and of the State of Maine and Her Majesty the Queen

in Right of Ontario have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the aforesaid suggestions are denied.

*Per Curiam*

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Silberman and D. H. Ginsburg did not participate in this order.

## APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 84-0853

STATE OF NEW YORK, *et al.*,
*Plaintiffs,*

v.

LEE M. THOMAS, *et al.*,
*Defendants.*

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[Filed July 26, 1985]

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MEMORANDUM OPINION

NORMA HOLLOWAY JOHNSON, District Judge.

Before the Court are a motion for summary judgment filed by plaintiffs and motions for summary judgment and to dismiss filed by defendant and defendant-intervenors in this action to compel the Administrator of the Environmental Protection Agency (EPA) to perform certain duties under the Clean Air Act, 42 U.S.C. § 7401 et seq. (1977). Plaintiffs are six states, four environmental associations, and four individuals who seek to alleviate damage occurring in eastern Canada allegedly caused by the international movement of harmful pollutants originating in the midwestern United States. Defendant is the Administrator of the EPA and is sued in his capacity as such. The National Coal Association and several industrial power companies were granted leave to inter-

vene in these proceedings and filed briefs in support of defendant's motion to dismiss and for summary judgment. Plaintiffs seek an order compelling the Administrator to require emitting states to revise their State Implementation Plans (SIP's), as mandated under section 115 of the Clean Air Act, 42 U.S.C. § 7415, in order to abate the damage allegedly traceable to the transboundary air pollution.

## I. FACTUAL BACKGROUND

This action has its origin in a letter written during the final days of the Carter Administration from Douglas M. Costle, then Administrator of the EPA, to former Secretary of Edmund Muskie (Appendix A). This letter, dated January 13, 1981, concluded in part that "acid deposition is endangering public welfare in the U.S. and Canada and . . . U.S. and Canadian sources contribute to the problem not only in the country where they are located but also in the neighboring country." Costle stated in the letter that his conclusion was based on a report issued by the International Joint Commission. Additionally, in his letter, Costle analyzed legislative provisions similar to section 115 passed by the Canadian Legislature on December 17, 1980, and concluded that these provisions afforded the United States essentially the same rights as Canada was given under United States law. Costle reiterated and expanded upon his conclusions in a letter sent to Senator George Mitchell (Appendix B) on January 13, 1981, and issued his findings in a press release dated January 16, 1981. Plaintiffs contend that the determinations made by Costle were sufficient to invoke section 115 of the Clean Air Act which, plaintiffs urge, sets in motion a process culminating in revision of SIP's by polluting states. No Administrator, however, has issued formal notification to the governor of any state from which such emissions originate, as would be required by the statute. Indeed, former Administrators Gorsuch and Ruckelshaus have stated their belief that Costle's actions

were insufficient to invoke section 115. Whether section 115 applies in this case—and, if so, its effect—is at controversy in the present action.

Section 115 provides in pertinent part:

> (a) Whenever the Administrator, upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country or whenever the Secretary of State requests him to do so with respect to such pollution which the Secretary of State alleges is of such a nature, the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.
>
> (b) The notice of the Administrator shall be deemed to be a finding under section 7410(a)(2)(H)(ii) of this title which requires a plan revision with respect to so much of the applicable implementation plan as is inadequate to prevent or eliminate the endangerment referred to in subsection (a) of this section. Any foreign country so affected by such emission of pollutant or pollutants shall be invited to appear at any public hearing associated with any revision of the appropriate portion of the applicable implementation plan.
>
> (c) This section shall apply only to a foreign country which the Administrator determines has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by this section.

42 U.S.C. § 7415(a)-(c).

## II. JUSTICIABILITY

### A. *Statutory Basis for Jurisdiction*

The Clean Air Act contains a citizen suit provision to permit enforcement of required actions under the Act by private citizens. This section states:

> Except as provided in subsection (b), any person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator. . . . (b) *Notice.* No action may be commenced . . . prior to 60 days after the plaintiff has given notice of such action to the Administrator. . . .

42 U.S.C. § 7604.

Plaintiffs allege that under section 115 the Administrator is charged with performing a mandatory duty and due notice having been served upon him, they thus invoke jurisdiction under the citizen suit section. Whether the duties of the Administrator under section 115 are mandatory or discretionary is discussed more fully in Part III of this opinion, *see infra* pp. 1485-1486; however, as the Court concludes that the duties are mandatory, jurisdiction of this action properly lies in the district court under 42 U.S.C. § 7604. *See Kennecott Copper Corporation, Nevada Mines Division, McGill, Nevada v. Costle*, 572 F.2d 1349 (9th Cir.1978).

### B. *Applicability of TRAC*

Intervenors argue further that, notwithstanding the provisions of 42 U.S.C. § 7604, jurisdiction of this action is exclusively vested in the United States Court of Appeals for the District of Columbia Circuit based on that court's recent decision in *Telecommunications Research and Action Center v. Federal Communications*

*Commission*, 750 F.2d 70 (D.C.Cir.1984) (TRAC). Specifically, intervenors argue that under *TRAC* any action or inaction by the Administrator with respect to the Costle letters is reviewable only in the Court of Appeals for this Circuit pursuant to section 307 of the Clean Air Act. Section 307 provides for direct review by the court of appeals of "final action taken" in specific and enumerated instances. See 42 U.S.C. § 7607(b)(1). However, as the subject of the instant complaint is not "final action" and is not included among the specific statutory bases for appellate court jurisdiction, section 307 cannot apply.

Intervenors' reliance on *TRAC* is misplaced. Plaintiff in *TRAC* claimed that the FCC unreasonably delayed making a determination that AT & T was required to reimburse ratepayers for allegedly unlawful overcharges. Under the applicable statute, exclusive jurisdiction was conferred upon the court of appeals to determine the validity of "all final orders of the Federal Communications Commission." 28 U.S.C. § 2342(1) (1982); 47 U.S.C. § 402(a) (1982). The court of appeals held that its jurisdiction was exclusive over nonfinal matters as well by virtue of the exclusive jurisdiction provision coupled with the All Writs Act, 28 U.S.C. § 1651(a) (1982). The All Writs Act empowers federal courts to issue writs necessary to aid their respective jurisdictions. The court held that its authority would "extend[] to support an ultimate power of review, even though it is not immediately and directly involved." 750 F.2d at 76.

The present case differs markedly from *TRAC*. Rather than vesting ultimate review in the court of appeals, the Clean Air Act specifically defines the role the district courts are to play in its enforcement. Plaintiffs do not seek review of final agency action which would be cognizable under section 307. They seek review of an alleged failure to take action alleged to be mandatory. Although Costle's acts fall short of final action—as was

the case in *TRAC*—there is no need—and, indeed, no authority—for the court of appeals to protect its prospective jurisdiction. The review of the failure to perform a nondiscretionary act is vested in the district court under section 304. The EPA, which argues contrarily to intervenors with respect to this issue, urges in its surreply that intervenors "can only read *TRAC* into this case by reading section 304 out of the Clean Air Act." EPA Surreply at 2. As this claim is properly before the Court under section 304, the Court now proceeds to determine whether a justiciable controversy has been presented.

C. *Subject Matter Jurisdiction*

Defendants have moved to dismiss the complaint for lack of subject matter jurisdiction. The Court has reviewed the alternative bases for dismissal and concludes that plaintiffs have alleged material facts sufficient to sustain their claim that the court possesses subject matter jurisdiction.

Article III of the United States Constitution defines and limits the jurisdiction of United States courts, stating in part that the judical power shall extend only to cases and controversies. *Hall v. Beals*, 396 U.S. 45, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969). This constitutional requirement has been interpreted by the United States Supreme Court to mean that a plaintiff seeking redress must allege:

a. threatened or actual direct injury resulting from the putatively illegal action; and

b. an injury that can be fairly traced to the challenged action that is likely to be redressed by a favorable decision.

*Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982) ("*Valley*

*Forge*") [quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976)]. *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 2204-04, 45 L.Ed.2d 343 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973); *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962).

These requirements assume constitutional stature because they tend to ensure "a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472, 102 S.Ct. at 758. Thus, even where Congress creates a statutory right of action, as it has through section 304, a litigant suing under such a statute may vindicate his claim only if he meets the constitutional requirements articulated above, although a statutory right of action will excuse a litigant from meeting the federal common law "prudential" requirement of justiciability. *Warth v. Seldin*, 422 U.S. at 501, 95 S.Ct. at 2206. *See also Valley Forge*, 454 U.S. at 487-88 n. 24, 102 S.Ct. at 766-67 n. 24.

1. *General Principles*

Section 304 of the Clean Air Act, as noted above, provides that "any person" may commence a civil action to compel the Administrator to undertake action under the Act which is not discretionary. Under section 302 of the Act, person is defined to include "an individual, corporation, partnership, association [or] State. . . ." Thus, all of the plaintiffs who have joined in this action have statutorily cognizable claims. In addition, all plaintiffs except Representative Ottinger have presented facts sufficient to meet the constitutional requirements discussed above.

The state plaintiffs in this action seek enforcement not only for their citizens but on their own behalf. Al-

though states frequently sue under the doctrine of *parens patriae*, it is not uncommon for them also to maintain their own actions. The Supreme Court has countenanced this procedure by holding in a related context that states may rely on such statutes to establish standing to challenge federal executive action. *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 83 S.Ct. 1266, 10 L.Ed.2d 357 (1963) (state permitted to sue under the Natural Gas Act without meeting *parens patriae* criteria); *Phillips Petroleum Company v. Wisconsin*, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954); *Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C.Cir.1976) *cert. denied*, 429 U.S. 977, 97 S.Ct. 485, 50 L.Ed.2d 584; *see also Hancock v. Train*, 426 U.S. 167, 196, 96 S.Ct. 2006, 2020, 48 L.Ed.2d 555 (1976) (section 304 of the Clean Air Act "is the only means provided by the Act for the States to remedy noncompliance").

The citizen group plaintiffs sue on behalf of themselves and on behalf of their members "who reside in areas throughout the midwestern and northeastern states and eastern Canada and breathe air pollution and suffer the other types of acid rain damages which are the subject of this action." Complaint at 4. Defendants argue that plaintiff associations have failed to allege that the associations or their members had been adversely affected by the inaction of the Administrator, relying principally on *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) and *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343. These cases, however, do not prove defendants' contention. In *Sierra Club v. Morton*, plaintiff sued to obtain judicial review of action by the United States Forest Service approving recreational development in the Sierra Nevada Mountains. The Supreme Court denied standing to the plaintiff because it "failed to allege that it or its members would be affected in any of their activities or pastimes. . . ." 405 U.S. at 735, 92 S.Ct. at 1366. In the present case, however, the plaintiffs have alleged

not only that emissions from the polluting states have adversely affected eastern Canada, but also have alleged and supported with documentation that its members live, work, vacation, or own property in eastern Canada.

Moreover, in *Warth*, the Supreme Court recognized that an association may assert the rights of its members, but denied standing to the associated because none of them have *sufficiently* alleged cognizable injury. In this case, plaintiff associations have alleged with particularity that many of its members have suffered or will suffer concrete harm as a result of the putatively illegal inaction. Unlike *Warth*, which involved a tenuous casual link between the alleged illegality and the alleged harm, the present case involves alleged inaction which, if cured, may lead directly to reduced emissions and thus reduced harm. Plaintiffs have quite clearly stated that "respirable particulates and deposition of acidic materials are causing substantial and irreversible damage to the health and welfare of the people of the plaintiff states, plaintiff organizations, and the individual plaintiff." Complaint at 1-2.

The individual plaintiffs, with the exception of Representative Ottinger, also have alleged material facts sufficient to enable them to proceed as plaintiffs in this action. These plaintiffs own property in the Muskoka Lake area of Ontario and allege that their "air and water quality and personal property have been damaged by air pollution emitted from certain Midwestern States." Complaint at 5. Although defendants have countered that these plaintiffs have failed to specify any adverse effects that have impaired the use of their property, the Court is of the opinion that this is not required. Plaintiffs have alleged that their health and property have been placed in jeopardy by the pollutants. Further, the fact of their presence in a geographical region harmed by the Administrator's alleged inaction is sufficient to confer upon them a cognizable interest. *See*

*Sierra Club v. Morton*, 405 U.S. at 734, 92 S.Ct. at 1366 ("[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process").

Representative Ottinger asserts a cognizable interest by virtue of his position as a Member of Congress. However, there are no special standards for determining congressional standing. As Representative Ottinger has not alleged any property interest or personal presence in the affected areas, and has not alleged other facts which entitle him to invoke the Court's jurisdiction, his complaint is merely a generalized grievance shared equally with all citizens. However, as the other plaintiffs have alleged claims sufficient to invoke the Court's jurisdiction, Ottinger may remain in the action. *See Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160, 102 S.Ct. 205, 212, 70 L.Ed.2d 309 (1981); *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 264 n. 9, 97 S.Ct. 555, 563 n. 9, 50 L.Ed.2d 450 (1977).

2. *Direct Injury*

In addition to presenting properly cognizable claims in their respective or individual capacities, plaintiffs also have alleged cognizable direct injury sufficient to meet the constitutional requirement of direct injury. As noted above, environmental harm is a legally redressable injury. *Sierra Club v. Morton*, 405 U.S. at 734, 92 S.Ct. at 1366. Further, although defendants object that plaintiffs have not presented specific evidence of identifiable harm that has befallen them, legally recognizable harm may be retrospective or prospective in nature. *See United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n. 14, 93

S.Ct. 2405, 2417 n. 14, 37 L.Ed.2d 254 (1973) ("SCRAP") *See also Linda R.S. v. Richard D.*, 410 U.S. at 617, 93 S.Ct. at 1148 ("Although the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some *threatened or actual injury* resulting from the putatively illegal action before a federal court may assume jurisdiction") (emphasis added) (citations omitted). Since emissions from polluters in the midwestern United States may cause damage to air quality, water quality, and property in Canada, areas in which plaintiffs' citizens or members live, work, vacation or own property, plaintiffs have alleged threatened or actual injury sufficient to establish standing. *See Friends of the Earth v. Potomac Electric Power Company*, 419 F.Supp. 528, 530 (D.D.C. 1976) (association found to have standing to sue under the Clean Air Act to abate pollution in Washington, D.C. where 430 of its 28,000 members resided or worked in Washington and thus breathed and were harmed by pollution).

3. *Traceability and Redressability*

Article III requires that the injury complained of be fairly traced to the challenged action and that the harm involved be likely to be redressed by judicial intervention. As plaintiffs correctly noted, traceability and redressability "are inseparable in the present case because the relief plaintiffs seek in an order compelling the EPA to end the very inaction which is the cause of plaintiffs' injuries." Plaintiffs' Memorandum of Points and Authorities at 41. These questions are problematic in the area of acid precipitation because of political and scientific dispute over the extent to which acid rain causes damage to aquatic ecosystems, terrestrial ecosystems, animal health, human health, or artifacts. *See generally* Carroll, *Acid Rain: An Issue in*

*Canadian-American Relations* (Toronto and Washington: 1982). Defendants in this case contend that plaintiffs have failed to establish a causal link between EPA inaction and the aggravated harm in Canada. They argue that, even if EPA is required to act, "it would be difficult, if not impossible, to identify facilities causing international pollution over hundreds of kilometers." Memorandum In Opposition to Plaintiffs' Motion for Summary Judgment at 19. This argument, however, is little more than an assertion that EPA is unable or unwilling to do what Congress has mandated it must do. Indeed, at the heart of section 115 is the congressional determination that the revision of state implementation plans is an effective mechanism for abatement of international air pollution. *See* S.Rep. No. 127, 95th Cong. 1st Sess. 57 (1977), U.S. Code Cong. & Admin.News 1977, p. 1077. *See also Animal Welfare Institute v. Kreps*, 561 F.2d 1002, 1010 (D.C.Cir.1977), *cert. denied*, 434 U.S. 1013, 98 S.Ct. 726, 54 L.Ed.2d 756 (1978) (by enacting remedial measures under the Marine Mammal Protection Act, Congress determined that a causal relationship existed between American import practices and South African sealing practices). As the language of section 115 clearly indicates that a reduction in emissions will abate the deleterious effects of midwestern pollution on public health and welfare in Canada, the Court concludes that the constitutional requirements of traceability and redressability have been satisfied. Moreover, the United States Court of Appeals for the District of Columbia Circuit has held that the "redressability requirement" is to be construed broadly in favor of plaintiffs:

> [B]ecause the relevant inquiry is directed to the effect of a future act (the court's grant of the requested relief) it would be unreasonable to require the plaintiff to *prove* that granting the requested relief is *certain* to alleviate his injury. Furthermore, as cases such as the present one show, litiga-

> tion often 'present[s] complex interrelationships between private and government activity that make difficult absolute proof that the harm will be removed.' Thus, a court should be careful not to require too much from a plaintiff attempting to show redressability, lest it abdicate its responsibility of granting relief to those injured by illegal government action.

*Community Nutrition Institute v. Block*, 698 F.2d 1239, 1248 (D.C.Cir.1983) (citations omitted), *rev'd on other grounds*, —— U.S. ——, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984). *Accord: International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 811 n. 27 (D.C.Cir. 1983); *cert denied*, —— U.S. ——, 105 S.Ct. 93, 83 L.Ed.2d 39 (1984). Moreover, plaintiff need not show that the injury would be completely redressed, so long as " 'the requested relief would benefit [them] in some perceptible, tangible fashion.' " *Sierra Club v. Edwards*, 19 Envir.Rep. (BNA) 1357, 1366 (D.D.C.1983) (citing *Public Citizen v. Lockheed Aircraft Corporation*, 656 F.2d 708, 715 (D.C.Cir.1977). Therefore, there is no basis to conclude that the injury is not likely to be redressed by a favorable decision. Having concluded that the plaintiffs have presented a justiciable controversy, the Court now turns its attention to the merits of the action.

## III. ANALYSIS OF THE SECTION 115 CLAIM

The task before the Court now is to determine if the requirements of section 115 have been satisfied and, if so, what action is required by the Administrator under the statute.

### A. *Whether Section 115 Has Been Satisfied*

#### 1. Receipt of Reports

"The initial requirement under section 115 is that the Administrator receive a report from a duly constituted

international agency . . . ." 42 U.S.C. § 7415. Costle stated in his letter to Secretary Muskie that he examined in connection with his consideration of the United States-Canada acid rain issue the *Seventh Annual Report on Great Lakes Water Quality*, issued in October 1980 by the International Joint Commission. Costle averred that this report "confirms that acid deposition is endangering public welfare in the U.S. and Canada. . . ." It thus appears that his determination was made "upon receipt" of the IJC report. Therefore, the only question remaining is whether the IJC is a duly constituted international agency.

Although the phrase "duly constituted international agency" is not defined in the Act or in the legislative history, the IJC would meet the expectations of the drafters of this section. The Commission, established by the Boundary Waters Treaty of 1909, United States-Canada, 36 Stat. 2448, T.S. No. 548 (effective May 13, 1910), is charged with the responsibility of resolving transboundary water and navigational disputes between the United States and Canada. It includes the approval of applications for the use, obstruction, or diversion of water which would affect the natural level or flow of water on the other side of the boundary and the investigation of disputes involving United States-Canada boundaries. *See generally* B. Caplan, *The Applicability of Clean Air Act Section 115 To Canada's Transboundary Acid Precipitation Problem*, 11 B.C.Envtl.Aff.L.Rev. 539, 580-82 (1984). Based on these characteristics of the Commission and the apparent agreement by the parties that the agency is duly constituted, the Court concludes that the Costle determination was made "upon receipt of reports, surveys or studies from any duly constituted international agency. . . ."

2. Reason to Believe

In order to trigger invocation of section 115, the Administrator must have "reason to believe that any air pol-

lutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country . . . ."

The IJC Report, upon which Administrator Costle in part based his decision, concludes that:

> "transmission of toxic and hazardous substances to the Great Lakes via long range atmospheric transport and deposition is a serious problem which requires further research efforts and control measures . . . . All parts of the Great Lakes watershed are now receiving precipitation containing 5 to 40 times more acid than would occur in the absence of atmospheric emissions."

Based on these findings, the Commission recommended "appropriate actions to substantially reduce atmosphere emissions of sulphur and nitrogen oxides from existing as well as new sources. . . ."

The Clean Air Act does not specifically state what is necessary for the Administrator to have "reason to believe," but the IJC Report would have afforded Costle ample basis upon which to conclude that air pollutants in the United States contribute to acid precipitation occurring in Canada such that it could reasonably be anticipated that the public health and welfare of Canada would be endangered. Indeed, that is exactly what Costle believed, for he specifically stated that "the IJC Report confirms that acid deposition is endangering public welfare in the United States and Canada and that the United States and Canadian sources contribute to the problem not only in the country where they are located but also in the neighboring country."

Defendants argue that Costle's findings are ambiguous and do not satisfy the requirements of section 115. They contend that Costle only made the finding that "the *cumulative effects* of Canadian and the United States emissions

are creating a risk of public harm in Canada." EPA Motion to Dismiss at 29. This argument, however, cannot be reconciled with Costle's statements. In the letter to Senator Mitchell, Costle stated:

> The relative contribution of U.S. and Canadian emission sources to acid deposition problems in the U.S. and Canada varies widely from location to location. . . . Surveys conducted over the past several years establish that there is a significant flow of these pollutants across the U.S.-Canadian border in both directions. Thus, we can say with some certainty that emission sources in the U.S. contribute significantly to the atmospheric loadings over some sensitive areas in Canada and that emission sources in Canada contribute significantly to the loadings over some sensitive areas in the United States.

Plaintiffs' Exhibit 1-E at 2-3.

It was based on this information that Costle had reason to believe that "U.S. and Canadian sources contribute to the problem not only in the country where they are located but also in the neighboring country." Therefore, this requirement of the statute is satisfied.

3. Reciprocity

In addition, section 115 requires that its provisions be invoked only where the Administrator has determined that the foreign country involved afford to the United States essentially the same rights that the United States grants it with respect to international air pollution.

Under section 21.1 of the Canadian legislation, if the Minister of Environment has reason to believe that Canadian contaminants contribute to air pollution which may reasonably be expected to constitute a significant danger to the health, safety, or welfare of persons in another country, the Minister shall recommend to the Governor in Council specific emission standards appropriate to re-

duce the damage. Additionally, the statute requires the Minister of Environment to consult with the province where the source of the international air pollution is located and provides that a particular province can act to remedy air pollution affecting a foreign country much in the same way that a state might revise its SIP's under section 115(b).

Costle discussed the Canadian law provisions and their effect on the issue of reciprocity in the letters he wrote to Secretary Muskie and Senator Mitchell. Costle concludes that "the amendments to the Canadian Clean Air Act do give adequate authority to the Government of Canada to provide essentially the same rights to the United States as Section 115 provides to Canada." However, Costle qualifies this conclusion by characterizing the reciprocity determination as a fluid and dynamic situation that is subject to change. He states that his determination "could be changed should the U.S. conclude that future Canadian actions interpreting or implementing their legislation were not giving essentially the same rights to the U.S." In addition, Costle emphasizes that at the time of any final action, "the Administrator must continue to be able to find that Canada is giving the United States essentially the same rights . . . ."

Defendants urge that Costle merely opines on whether the Canadian legislation provides reciprocal rights to the United States. Defendants cite to Costle's language that his determination is not "permanently binding. . . ." However, this merely underscores the reality that a finding under the statute must be based on an analysis of facts and law as they exist at a particular time and that a change of either facts or law might require reexamination of the determination. Moreover, should defendants wish to challenge Costle's findings, the appropriate time and forum would be after a final action has been taken by the Administrator in an action commenced in the court of appeals. 42 U.S.C. § 7607.

Based on its review of Costle's letters, the Court concludes that Costle did in January 1981 satisfy the section 115 requirement that "the Administrator determine[] [that Canada give[s]] the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by this section." However, the Court is concerned by Costle's own qualifications of his conclusion, aggravated in this case by the lengthy passage of time since the determination was made. Therefore, the Court will afford the current EPA Administrator an opportunity to review the issue of reciprocity to determine whether Costle's conclusion remains viable.

B. *The Effect of a Finding That Section 115 Has Been Invoked*

Under section 115, once the formal requirements of the statute have been met, "the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate." 42 U.S.C. § 7415(a). This notice "shall be deemed to be a finding . . . which requires a plan revision with respect to so much of the applicable implementation plan as is inadequate to prevent or eliminate the endangerment referred to in subsection (a)." 42 U.S.C. § 7415(b).*

Defendants attack the legal significance of Costle's findings on three bases. First, they argue that Costle's

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* The Court notes that the states to which notification is due were not identified by Costle. Costle instructed his staff to determine which states were to be targeted, but no final action was taken. The Court is convinced that the obligation to identify the polluting states is incidental to giving formal notification and not a prerequisite to the conclusion that Costle made the requisite findings under section 115. The construction of section 115 and Costle's description of the statute in his letter to Secretary Muskie illustrate that section 115 is triggered once the Administrator receives qualified reports that give him reason to believe United States sources are polluting Canada and the Administrator makes the requisite finding of reciprocity.

findings did not constitute official decision-making. Second, they contend that Costle's actions were revoked by the actions of his successor, Administrator Gorsuch. Third, defendants urge that the decision to act under section 115, even once the necessary findings have been made, is discretionary.

1. Official Decision-Making

With respect to whether Costle made official determinations, defendants note that Costle's determination was made by letter and argue that letters cannot constitute formal administrative decision-making. Defendants suggest that another method, for example, publishing the letters in the Federal Register, would have given the determinations the characteristics of official action.

Plaintiffs reply that the letters have all the attributes of official agency action because they were written to the Secretary of State, who is charged with administering foreign relations and because they were publicized as agency action in a press release. Plaintiffs cite other examples of official EPA action which was taken by communicating through correspondence. The Court concludes that the fact that Costle memoralized his findings in a letter does not defeat their classification as official agency action. It appears that publication in the Federal Register would be inappropriate for this kind of action because it is not a rule or policy statement. 5 U.S.C. §§ 552(a)(1) and 553(b). Additionally notification to the Governors would presumably be achieved by letter. That the Administrator chose this medium to make his findings should not frustrate the Administrator's intent to secure compliance by the states.**

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** Correspondence is frequently used by EPA to take formal action under the Clean Air Act. For example, notification to owners of major pollution sources that are subject to particular emission control requirements is frequently accomplished by correspondence. *See Harrison v. PPG Industries*, 446 U.S. 578, 582, 100 S.Ct. 1889,

2. Revocation

Defendants also argue that whatever determinations Costle made were revoked by Administrator Gorsuch in a letter she sent to the Governor of Ohio on September 22, 1981. In this letter, Gorsuch assured Governor Rhodes that Costle's letter did not satisfy section 115 and that the letter was void of legal significance. *See* Defendants' Exhibit 1.

Plaintiffs counter that while Gorsuch made a legal conclusion of the effect of the letter, she did not review the factual bases for the determination nor suggest that these determinations were erroneous. This kind of factual review appears to have been necessary under the ordinary procedure that an Administrator employs to avoid being bound by the decisions of a predecessor. *See* EPA Exhibit 6 ("a new Administrator could "reconsider" or "make different findings"). Gorsuch made no such factual findings. She did not address the relevant facts which would have been considered in revoking the prior administrative findings. She did not refer to any change of circumstances which would call into question the adequacy of Canadian law to provide rights to the United States. She did not address any changes in scientific evidence demonstrating the cessation of adverse impacts in Canada from U.S. emissions. Therefore, it cannot be concluded that the Gorsuch letter revoked the Costle determination that section 115 was applicable. *See Motor Vehicle Manufacturers Association of the*

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1892, 64 L.Ed.2d 525 (1980); *Hawaiian Electric Company v. EPA*, 723 F.2d 1440, 1442 (9th Cir. 1984). Determinations that a source is not in compliance with emission control requirements under 42 U.S.C. § 7413 of the Act is accomplished by correspondence. *Wisconsin's Environmental Decade, Inc. v. Wisconsin Power and Light Co.*, 395 F. Supp. 313 (W.D. Wis. 1975). Waivers by the Administrator of "new source performance standards" under 42 U.S.C. 7411(j) have been denied to operators of emission sources by way of correspondence. *Central Illinois Public Service Co. v. U.S. EPA*, 594 F.2d 636, 637 (7th Cir. 1979).

*United States, Inc. v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983) ("Revocation constitutes a reversal of the agency's former views as to the proper course. A 'settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.' Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance") (citations omitted).

3. Discretionary Act

Third, defendants urge that the decision to act under section 115 is discretionary. The Court notes that this is really a jurisdictional argument because section 304 jurisdiction exists in the district court only to challenge mandatory duties that the Administrator has failed to perform. Nevertheless, defendants urge that, even if Costle made the requisite findings under the statute, the decision whether to notify the Governors or to take any additional steps under section 115 is discretionary.

Defendants' argument finds no support either in the statute and its legislative history or in the relevant case law. The plain language of section 115 is clear: whenever the Administrator makes the findings set forth in the statute, "the Administrator *shall* give formal notification thereof to the Governor of the State in which such emissions originate" (emphasis added). As reiterated by the United States Court of Appeals for the District of Columbia Circuit, when the Clean Air Act uses "shall," the normal inference is that the act is mandatory. *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 664 (D.D.Cir.1975). *See also Anderson v. Yungkau*, 329 U.S. 482, 485, 67 S.Ct. 428, 430, 91 L.Ed 436 (1947). In addi-

tion, the *Report of the Committee on Public Works* of the United States Senate concluded that "[s]ection 115, as revised, therefore, provides that the determination that emissions of air pollutants in the United States are endangering the health or welfare of citizens of a foreign country *will require* the State in which the source of those emissions is located to revise its implementation plan to control those emissions." *Senate Comm. on Public Works, Clean Air Amendments of 1976, S.Rep. No. 717*, 94th Cong., 2d Sess. (1976).

Defendants argue that a section 115 decision must be discretionary because it "requires the fusion of technical knowledge and skills with judgment which is the hallmark of duties which are discretionary." Intervenors' Memorandum of Points and Authorities at 17 (quoting *Kennecott Copper Corporation, Nevada Mines Division, McGill, Nevada v. Costle*, 572 F.2d 1349 (9th Cir.1978) (*"Kennecott"*)). However, the cases upon which defendants rely and other relevant cases suggest that discretion exists in the Administrator to determine only the *manner* in which the duty is to be executed, not whether it is to be executed. In *Kennecott*, for example, the court held that it did not have jurisdiction under section 304 of the Clean Air Act because the plaintiff sought review of a discretionary action. Specifically, plaintiff sought a declaratory judgment that it had satisfied the Act by making certain improvements. Plaintiff relied on section 110(a)(3) of the Act, which states that the Administrator "shall approve" any revision meeting the statutory requirements, to contend that the Administrator was under a mandatory duty to approve a variance. However, the Court held that determining whether a SIP met the requirements was discretionary, thus it had no jurisdiction. The Court pointed out that once the Administrator had made the determination that the statutory requirements had been met, "there is a nondiscretionary duty to act in accordance with his determination." 572 F.2d at 1355. This holding is applicable to the present case. The Administrator exercised discre-

tion in determining whether the statutory requirements had been met, but once he made the determination that the requirements had been satisfied, he was under a mandatory duty to act in accordance with the statute by giving formal notification to the Governors. The relevant case law uniformly upholds the determination that sections employing the word "shall" in the Clean Air Act signify mandatory duties. *See Train v. Natural Resources Defense Council*, 421 U.S. 60, 79, 95 S.Ct. 1470, 1481, 43 L.Ed.2d 731 (1975) (once statutory criteria are met, agency action is required); *Natural Resources Defense Council v. Train*, 545 F.2d 320, 328 (2d Cir.1976) (to hold other than that the use of "shall" in the statute is to render this mandatory language mere surplusage); *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 662 (D.C.Cir.1975) (it would be an abuse of discretion for the Administrator to fail to revise a standard of performance when the evidence supporting revision is compelling); *Citizens for a Better Environment v. Costle*, 515 F.Supp. 264 (N.D.Ill.1981); *Dow Chemical Company v. Costle*, 480 F.Supp. 315, 317 (E.D.Mich.1978), *aff'd*, 659 F.2d 724 (6th Cir.1981). Therefore, the Court concludes that the duty of the Administrator to act according to the statute is nondiscretionary under section 115.

## IV. CONCLUSION

The Court concludes from the record before it that defendants' motions to dismiss and for summary judgment must be denied and that plaintiffs' motion for summary judgment should be granted. Having concluded that Administrator Costle properly invoked section 115 of the Clean Air Act, it now is incumbent upon the current EPA Administrator to "give formal notification to the Governors of the states in which harmful emissions originate and to set in motion the necessary processes to require a plan revision so as to prevent or eliminate the endangerment encompassed by the Costle determinations. An appropriate Order accompanies this Memorandum.

# APPENDIX A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

JAN 13 1981

Honorable Edmund S. Muskie
Secretary of State
Washington, D.C. 20242

Dear Mr. Secretary:

As you know, on December 17, 1980, the Canadian Parliament approved legislation providing the Canadian federal government with authority to abate emissions from Canadian sources which contribute to transboundary air pollution. On December 24, 1980, the Department of State announced that the United States would evaluate the Canadian legislation to determine whether it provides essentially the same rights as Section 115 of the U.S. Clean Air Act.

As required by the Clean Air Act, I have completed my review of the Canadian legislation. After consultation with the Department of State, I have concluded that the Canadian legislation provides the Government of Canada with authority to give the United States essentially the same rights as Section 115 of the Clean Air Act gives to Canada. In addition to this initial determination based on the language of the Canadian legislation, the Administrator must be able to determine that the Government of Canada is exercising or interpreting that authority in a manner that provides essentially the same rights to the United States. This second aspect of EPA's determination is necessarily a dynamic one which will continue to be influenced by Canadian action now and in the future.

Section 21.1(1) of the Canadian legislation provides that where the Minister of Environment has reason to believe that an air contaminant emitted by a Canadian source or sources creates or contributes to air pollution that may reasonably be expected to constitute a significant danger to the health, safety, or welfare of persons in another country, the Minister shall recommend to the Governor in Council (the highest federal executive authority) specific emission standards for the source or sources, in relation to the air contaminant, either alone or in combination with one or more other air contaminants, as he considers appropriate to eliminate or significantly reduce the danger. Under Section 21.1(2), if Minister proposes a recommendation, the notice of the proposal is to be published in the *Canadian Gazette.* A reasonable opportunity to make representations to the Minister concerning the proposal is to be offered to persons in Canada who would be affected by the prescription of specific emission standards, and to the endangered country.

For sources other than 'federal" sources, Section 21.1 (3) in effect requires that before making a final recommendation the Minister must consult with the appropriate province and provide the province with an opportunity to eliminate or significantly reduce the danger to the other country.

Section 21.2(1) authorizes the Governor in Council to prescribe specific emission standards recommended by the Minister if the Governor in Council concludes that the foreign country considered in making the recommendation under Section 21.1(1) has provided for "essentially the same kind of benefits in favor of Canada with respect to abatement or control of air pollution as is provided in favor of the country" by the Canadian Clean Air Act. In order to prescribe a specific emission standard with respect to non-federal sources, the Governor in Council must conclude that reasonable efforts by the Minister to procure

reduction or elimination of the danger by the provincial government, have been unsuccessful.

As with most legislation, it is possible that the Canadian legislation could in the future be interpreted or implemented in a way that the United States would conclude that it was not being given essentially the same rights as as provided under Section 115. Thus, it is not possible to make a permanently binding determination that Canada has given the United States essentially the same rights based simply on a review of Canadian authorizing legislation. EPA first determines that Canadian legislation gives ample authority to the Government of Canada to provide essentially the same rights to the United States. Second, EPA must determine that the Government of Canada is exercising or interpreting that authority in a manner that provides essentially the same rights to the United States. This second aspect of EPA's determination is necessarily a dynamic one which will continue to be influenced by Canadian action now and in the future.

In my view, the amendments to the Canadian Clean Air Act do give adequate authority to the Government of Canada to provide essentially the same rights to the United States as Section 115 provides to Canada. Both Section 115 and Sections 21.1 and 21.2 authorize a federal official to make a finding or recommendation concerning endangerment to health or welfare of a foreign country due to any air pollutant emitted domestically, and to prescribe specific emission limits to eliminate, significantly reduce, or prevent the endangerment. The Canadian legislation refers to "significant danger to the health, safety or welfare of persons," thus my conclusion assumes this phrase will be interpreted to have essentially the same coverage as the Section 115 phrase "endanger public health or welfare." Both statutes allow the State or province, as appropriate, to take actions to remedy air pollution affecting a foreign country. If the State or

provincial government fails to develop an adequate remedy the federal government is authorized to establish emission limitations. Each statute also requires that the federal government provide opportunities for public hearing on any proposed action and participation in the hearing by an affected foreign government.

The principal difference in the two statutes is the detailed procedural and substantive requirements applicable to the State plan revision process under the U.S. Clean Air Act as opposed to the more general requirement in the Canadian legislation for provincial consultation and reasonable efforts to secure action by the provincial government. In my judgment, that difference does not significantly restrict the ability of the Government of Canada to provide essentially the same rights to the United States. The Canadian requirement for federal consultation and efforts to procure provincial action fills the same role as the State plan revision process in the U.S. system. Consequently, I have concluded that, despite the differing process at the State and provincial levels, the Canadian legislation does provide the Government of Canada with ample authority to give essentially the same rights to the United States as are provided by Section 115.

I should observe that the provisions of the Canadian legislation do appear to provide the Minister of Environment with some discretion regarding the scope of the remedy he must recommend, as well as the adequacy of any remedies undertaken by the provincial government. Similarly, the Governor Council is apparently provided with discretion regarding final prescription of specific emission standards as is the case for all regulations issued under the Canadian Clean Air Act. For these reasons, my determination that the Canadian legislation provides essentially the same rights as Section 115 could be changed should the U.S. conclude that future Canadian actions interpreting or implementing their legislation were not giving essentially the same rights to the U.S.

In connection with my review of the recent Canadian legislation, I have also examined the *Seventh Annual Report on Great Lakes Water Quality* issued on October 1980 by the International Joint Commission (IJC). I have concluded that the IJC Report confirms that acid deposition is endangering public welfare in the U.S. and Canada and that U.S. and Canadian sources contribute to the problem not only in the country where they are located but also in the neighboring country. I am enclosing a letter which I have sent to Senator George Mitchell on this subject which discusses the IJC Report in greater detail and the implications of these conclusions with respect to any future actions by EPA pursuant to Section 115 of the Clean Air Act.

Sincerely yours,

/s/ Douglas M. Costle
DOUGLAS M. COSTLE

Enclosure

# APPENDIX B

## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

JAN 13 1981

Honorable George Mitchell
United States Senate
Washington, D.C. 20510

Dear Senator Mitchell:

Thank you for your letter of December 23, 1980 regarding Section 115 of the Clean Air Act. As you are aware, this Section of the law requires EPA, if certain conditions are met, to call on States to revise their implementation plans where necessary to prevent or eliminate endangerment to public health or welfare in a foreign country stemming from air pollutants emitted in the United States.

Two recent actions require me to consider whether EPA should identify appropriate States for notification under this Section. First, in October 1980, the International Joint Commission submitted its *Seventh Annual Report on Great Lakes Water Quality.* That report contains a section describing damages due to transboundary air pollution and a recommendation that the Governments of the United States and Canada act to reduce certain air pollutants. Second, on December 17, 1980, the Canadian Parliament approved legislation providing the Canadian federal government with powers to abate transboundary air pollution. On December 24, 1980, the U.S. Department of State issued a public statement committing the United States to evaluate whether this Canadian legislation provides essentially the same rights as are provided by Section 115 of the Clean Air Act. The Clean Air Act requires the Administrator of EPA to make this determination.

There are two principal conditions which must be met before EPA can notify a State under Section 115 that a plan revision is required. First, the Administrator on receipt of reports, surveys, or studies from a duly constituted international agency must conclude that U.S. emissions are causing or contributing to endangerment in a foreign country, or must have received a request from the Secretary of State to notify a State. Second, before the provisions of Section 115 can be applied with respect to a foreign country, the Administrator must determine that the country provides the United States with essentially the same rights regarding international air pollution control as are provided by Section 115.

Your letter calls attention to certain reports which discuss problems of transboundary air pollution between the United States and Canada. As you are aware, the major focus of U.S.—Canadian concerns in the past two years respecting transboundary air quality has been on the question of the adverse impacts of acid deposition.

As my public statements over the past year have indicated, EPA has concluded that acid deposition, often referred to as acid rain, presents a genuine threat to our environmental well-being both in the U.S. and Canada. What we know or suspect about acid deposition indicates that the problem is genuine and serious:

—acid deposition can and has destroyed lake and stream ecosystems, killing fish and other water life;

—many lakes in Canada and the United States are already acidified and their fish populations are shrinking or are extinct;

—some soils are being damaged over time due to leaching of minerals and nutrients;

—the water and soils over extensive areas in North America are susceptible to acidification;

—stone buildings, monuments, and other building materials are eroded more rapidly by acid deposition;

—some important crops may be damaged by acid deposition and others may be injured by acidified soils;

—growth of forests may be reduced over time;

—over the long term some drinking water supplies may be contaminated by toxic metals leached from the soil as a result of acid deposition.

These kinds of impacts are within the range of impacts covered by Section 115. As you know, that Section is broadly drafted to encompass all forms of air pollution-related endangerment to public health or welfare and is not limited to interference with U.S. air quality standards or significant deterioration programs as is Section 126 of the Clean Air Act.

The relative contribution of U.S. and Canadian emission sources to acid deposition problems in the U.S. and Canada varies widely from location to location. The stress to our ecosystems created by acid deposition is a function of the total atmospheric loadings of sulfur and nitrogen compounds. Surveys conducted over the past several years established that there is a significant flow of these pollutants across the U.S.-Canadian border in both directions. Thus, we can say with some certainty that emission sources in the U.S. contribute significantly to the atmospheric loadings over some sensitive areas in Canada and that emission sources in Canada contribute significantly to the loadings over some sensitive areas in the United States.

Given our understanding of the impacts of acid deposition and of the joint contribution of U.S. and Canadian sources to the problem, I believe that the Section 115 authority could appropriately be used to develop

solutions, provided that either the Secretary of State requests action or that any relevant reports of international agencies state the existence of the problem and that Canadian law and practice provide the U.S. with essentially the same rights respecting emission sources located in Canada.

The International Joint Commission which is a duly constituted international agency under Section 115, has recently transmitted a report which addresses the issue of acid deposition. My view of the October 1980 *Seventh Annual Report on Great Lakes Water Quality of the International Joint Commission* (IJC) leads me to conclude that the IJC has found acid deposition results in significant harm in both the U.S. and Canada and that emission sources in both the U.S. and Canada contribute to the problem through the long-range transport of air pollution. The IJC Report states that "[a]cidic precipitation is one widely known and serious example of a problem associated with the long-range transport of airborne pollutants." (Report at 49). The Report states that "[v]irtually all of eastern Canada and portions of the northeastern United States experience rains with acidity equal to or exceeding that which can adversely affect susceptible ecosystems. All parts of the Great Lakes watershed are now receiving precipitation containing 5 to 40 times more acid than would occur in the absence of atmospheric emissions. Many inland lake ecosystems in the most susceptible parts of the Basin may be irreversibly harmed within 10-15 years." (Report at 50). The Report also notes that "[a] substantial portion of the Great Lakes drainage basin is potentially susceptible to acidic precipitation, based on its bedrock geology. The Sudbury, Muskoka and Haliburton areas of Ontario and the Adirondacks of northern New York are among the most heavily impacted areas in the world because their geology offers little buffering capacity to their inland lakes. Some lakes in the Haliburton-Muskoka area have lost 40-75 percent of their acid neutralizing

ability in a decade or less. These areas are now being subjected to precipitation which is twice as acidic as that which caused losses of major fish stocks in thousands of Scandinavian lakes." (Report at 50).

The Report points out "the massive and diffuse nature of the [emission] sources throughout eastern North America" (Report at 54) and notes that acid deposition often occurs "many hundreds of miles from the source." (Report at 50).

Finally, the IJC recommends in the Report that the Governments of the United States and Canada, "undertake further actions to reduce atmospheric emissions of the oxides of sulfur and nitrogen from existing as well as new sources." (Report at 5).

I have concluded that this report confirms my previously stated position that acid-deposition is causing sifinificant environmental problems on both sides of the U.S.-Canadian border due to emissions from U.S. and Canadian sources.

The question of whether Canada "has given the United States essentially the same rights" with respect to emission sources in Canada as is provided by Section 115 requires consideration of recently enacted Canadian legislation.

On December 17, 1980, the Canadian Parliament approved legislation which provides the Canadian federal government with authority to adopt emission standards for sources which contribute to air pollution related problems in another country. Specifically, Section 21.1(1) of the legislation provides that where the Minister of Environment has reason to believe that an air contaminant emitted by a Canadian source or sources creates or contributes to air pollution that may reasonably be expected to constitute a significant danger to the health, safety, or welfare of persons in another country, the Minister shall recommend to the Governor in Council

(the highest federal executive authority) specific emission standards for the source or sources, in relation to the air contaminant, either alone or in combination with one or more other air contaminants, as he considers appropriate to eliminate or significantly reduce the danger. Under Section 21.1(2), if the Minister proposes a recommendation, the notice of the proposal is to be published in the *Canadian Gazette*. A reasonable opportunity to make representations to the Minister concerning the proposal is to be offered to persons in Canada who would be affected by the prescription of specific emission standards, and to the endangered country.

For sources other than "federal" sources, Section 21.1(3) in effect requires that before making a final recommendation the Minister must consult with the appropriate province and provide the province with an opportunity to eliminate or significantly reduce the danger to the other country.

Section 21.2(1) authorizes the Governor in Council to prescribe specific emission standards recommended by the Minister if the Governor in Council concludes that the foreign country considered in making the recommendation under Section 21.1(1) has provided for "essentially the same kind of benefits in favor of Canada with respect to abatement or control of air pollution as is provided in favor of the country" by the Canadian Clean Air Act. In order to prescribe a specific emission standard with respect to non-federal sources, the Governor in Council must conclude that reasonable efforts by the Minister to procure reduction or elimination of the danger by the provincial government, have been unsuccessful.

As with most legislation, it is possible that the Canadian legislation could in the future be interpreted or implemented in a way that the United States would conclude that it was not being given essentially the same

rights as were provided under Section 115. Thus, it is not possible to make a permanently binding determination that Canada has given the United States essentially the same rights based simply on a review of Canadian authorizing legislation. EPA first determines that Canadian legislation gives ample authority to the Government of Canada to provide essentially the same rights to the United States. Second, EPA must determine that the Government of Canada is exericsing or interpreting that authority in a manner that provides essentially the same rights to the United States. This second aspect of EPA's determination is necessarily a dynamic one which will continue to be influenced by Canadian action now and in the future.

In my view, the amendments to the Canadian Clean Air Act do give *adequate authority to the Government of Canada to provide essentially* * the same rights to the United States as Section 115 provides to Canada. Both Section 115 and Sections 21.1 and 21.2 authorize a federal official to make a finding or recommendation concerning endangerment to health or welfare of a foreign country due to any air pollutant emitted domestically, and to prescribe specific emission limits to eliminate, significantly reduce, or prevent the endangerment. The Canadian legislation refers to "significant danger to the health, safety or welfare of persons," thus my conclusion assumes this phrase will be interpreted to have essentially the same coverage as the Section 115 phrase "endanger public health or welfare." Both statutes allow the State or province, as appropriate, to take actions to remedy air pollution affecting a foreign country. If the State or provincial government fails to develop an adequate remedy the federal government is authorized to establish emission limitations. Each statute also requires that the federal government provide opportunities for

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* Emphasis not in original.

public hearing on any proposed action and participation in the hearing by an affected foreign government.

The principal difference in the two statutes is the detailed procedural and substantive requirements applicable to the State plan revision process under the U.S. Clean Air Act as opposed to the more general requirement in the Canadian legislation for provincial consultation and reasonable efforts to secure action by the provincial government. In my judgment, that difference does not significantly restrict the ability of the Government of Canada to provide essentially the same rights to the United States. The Canadian requirement for federal consultation and efforts to procure provincial action fills the same role as the State plan revision process in the U.S. system. Consequently, I have concluded that, despite the differing process at the State and provincial levels, the Canadian legislation does provide the Government of Canada with ample authority to give essentially the same rights to the United States as are provided by Section 115.

I should observe that the provisions of the Canadian legislation do appear to provide the Minister of Environment with some discretion regarding the scope of the remedy he must recommend, as well as the adequacy of any remedies undertaken by the provincial government. Similarly, the Governor Council is apparently provided with discretion regarding final prescription of specific emission standards as is the case for all regulations issued under the Canadian Clean Air Act. For these reasons, my determination that the Canadian legislation provides essentially the same rights as Section 115 could be changed should the U.S. conclude that future Canadian actions interpreting or implementing their legislation were not giving essentially the same rights to the U.S.

As you know, Section 115 is activated by giving formal notification to the Governor of a specific State. EPA has not yet determined which State or States will require

notification under Section 115. I have instructed my staff to examine this issue and to develop recommendations regarding the States which should receive formal notification. Notification to a State under the Clean Air Act is only the first of several steps in the plan revision process. After receiving a plan revision notification, the State must identify and propose control measures to address the problem and provide opportunity for public hearing prior to adoption and submittal to EPA.

Several factors will require the EPA make extraordinary efforts to consult and cooperate with affected States in this process. The acid deposition problem is clearly a regional one which crosses numerous State boundaries. The affected States will need to discuss the problem with one another and EPA will need to assist them in this effort. Second, since there are no established numerical standards by which to assess the adequacy of acid deposition mitigation measures, EPA and the affected States will have to work closely on developing target levels for State and regional emission reductions.

In summary, I believe the IJC Report confirms that acid deposition is endangering public welfare in the U.S. and Canada and that U.S. and Canadian sources contribute to the problem not only in the country where they are located but also in the neighboring country. Regarding the requirement of reciprocal rights, I believe the new Canadian legislation provides the Government of Canada with ample authority to give the United States essentially the same rights as Section 115. While this conclusion is adequate to warrant the initiation of a Section 115 based plan revision process in appropriate States, I must emphasize that during such a process and at the time of any final action, the Administrator must continue to be able to find that Canada is giving the United States essentially the same rights based on an evaluation of Canada's interpretation and implementation of its legislation.

I appreciate your interest in this very important subject. EPA will continue to keep your office informed of its actions on this matter.

Sincerely yours,

/s/ Douglas M. Costle
DOUGLAS M. COSTLE

## APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 84-0853

STATE OF NEW YORK, *et al.*,
*Plaintiffs,*

v.

LEE M. THOMAS, *et al.*,
*Defendants.*

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[Filed July 26, 1985]

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### ORDER

Upon consideration of the cross-motions for summary judgment, the motion to dismiss, the supporting and opposing memoranda, and the entire record herein, and consistent with the Memorandum Opinion of even date, it is this 26th day of July, 1985,

ORDERED that the motion of intervenors to dismiss be, and hereby is, denied; it is further

ORDERED that the motion of defendants for summary judgment be, and hereby is, denied; it is further

ORDERED that the motion of plaintiffs for summary judgment be, and hereby is, granted and that summary judgment be, and hereby is, entered in favor of plaintiffs; and it is further

ORDERED that defendant Administrator, if he deems appropriate, determine, within ninety (90) days of the

date of this Order, whether the finding of reciprocity by former Administrator Costle remains viable; and it is further

ORDERED that, if there is a finding of reciprocity, defendant Administrator shall on or before one hundred eighty (180) days thereafter, comply with his mandate under section 115 by formally notifying the governors of any state in which such emissions originate.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

## APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 84-0853

STATE OF NEW YORK, *et al.*,
*Plaintiffs*

v.

LEE M. THOMAS, Administrator
United States Environmental Protection Agency,
*Defendant.*

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[Filed Sept. 9, 1985]

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Declaration of Charles L. Elkins

Charles L. Elkins declares that the following statements are true and correct to the best of his knowledge and belief and are based on his personal knowledge or on information contained in the records of the U.S. Environmental Protection Agency (EPA) or supplied to him by employees under his supervision at EPA.

1. I am the Acting Assistant Administrator of EPA's Office of Air and Radiation. As such, I am responsible for programs under section 115 of the Clean Air Act.

2. Section 115 of the Clean Air Act states that when the Administrator of EPA determines that emissions of air pollution in the United States "may reasonably be anticipated to endanger public health or welfare in a foreign country", he shall "give formal notification thereof to the Governor of the State in which such emis-

sions originate". That notification in turn acts as a directive to the Governor to revise the air pollution control plan for the State—the "State implementation plan" —so as to "prevent or eliminate the endangerment" on which the finding was based.

3. On July 26, this Court found that certain letters written by former Administrator Costle amounted to a binding "endangerment" finding within the meaning of section 115 as far as acid deposition damage in Canada was concerned. The Court directed the Administrator to issue section 115 notifications to Governors on or before April 23, 1986, assuming that he continued to find that Canada met certain specific legal pre-requisites to that notification.

4. On receipt of this Order, I directed my staff to evaluate the information and steps necessary to implement this requirement. Based on a preliminary review, EPA on August 9 filed in this case a motion stating that the time allowed by the Court's order for issuing these notices was insufficient and that the order should therefore be modified. This affidavit sets forth with particularity the steps that must be taken before issuing notices under section 115, and the time that EPA estimates would be necessary to take those steps.

5. I believe it is essential for EPA to analyze some of the basic questions raised by any regulatory program under section 115 and give guidance to the States on how to answer them before States are called on to revise their implementation plans under section 115. To my mind there are three such questions, each following from the one before it:

a. What types and quantitative levels of acid deposition are harmful to health or welfare in Canada?

b. How can emissions from the United States be linked quantitatively to damaging levels of acid deposition in Canada?

c. How much must each individual State reduce its emissions in order to eliminate or prevent health or welfare damage in Canada?

The 1981 letters by former Administrator Costle did not address these questions.

*Defining Acceptable Pollution Levels*

6. Section 115 requires control programs under it to reduce emissions enough to "prevent or eliminate" the environmental damage or damages that led to the issuance of section 115 notices.

The first steps in defining such a reduction are to specify (a) the damages caused by acid deposition and (b) the levels of pollution that cause it.

The United States is funding a ten-year research program on acid deposition under the Acid Precipitation Act of 1980, 42 U.S.C. 8901, *et seq.* One of the major purposes of this program is to answer the questions outlined above.

At present it is impossible, based on the results of this program and other research, and despite the four years and $132 million already invested, to draw sound and scientifically defensible quantitative links between acid deposition and environmental damage.

7. Suggestions have been made that acid rain might damage surface waters, forests, materials, commercial crops and human health. I will briefly address our current knowledge under each of these headings.

a. Of all the potential effects of acid deposition, the impacts on lakes and streams are the best understood. Yet even here, we still lack a firm scientific basis to assess the current extent or magnitude of acid deposition effects on inland waters either in the United States or in Canada. Likewise there is no scientifically credible way

to predict the future environmental consequences either of continued present levels of acid deposition, or of reduced levels. Only the most crude "rules of thumb" are available to policy makers, and our research to date has shown them to be even less reliable than originally thought.

Though research is beginning to change this picture, it is still at the stage of answering very preliminary questions. We have over the past 18 months spent approximately $10 million to carry out a statistically based survey of lakes in the Eastern United States. This is the first stage of a three-stage effort to determine the geographical extent and magnitude of surface water acidification in the United States. To the best of my knowledge there is no equivalent statistically based survey under way in Canada.

These survey efforts, when they are completed, will only tell us about current conditions. A separate though related research effort will address the question of changes in those conditions that current or reduced deposition levels might produce. Since the extent and nature of acid deposition damage to lakes and streams depends largely on chemical and physical interactions between the deposition and the local soil, this effort will attempt to develop a quantitative understanding of those interactions. Between October of 1984 and October of 1987, EPA will have spent eight million dollars and collected and analyzed over 2400 soil samples to develop this quantitative prediction capability for the eastern United States. We anticipate the first results of this effort early in 1987. To the best of our knowledge no equivalent research effort is currently under way in Canada.

b. The concern for possible forest effects of acid deposition is based on widespread changes (including extensive tree mortality) observed in some European forests and a limited set of observations of changes in some Eastern U.S. forests. Neither we nor the Europeans have

established any clear cause of these forest changes. However, air pollution is among the suggested and scientifically plausible causes, and acid deposition is among the air pollutants being evaluated as a cause of these effects. To date no definitive link between acid deposition and forest damage has been even qualitatively demonstrated with any scientific validity. The U.S. government will be spending $10 million in fiscal year 1985 and plans to spend $17 million in fiscal year 1986 on researching this problem. Because trees grow slowly and because the dynamics of forest growth are very complex, we anticipate that several years of work will be needed to determine qualitatively whether acid deposition affects forests. Additional research would then be necessary to gain a quantitative understanding of these effects.

As with aquatic effects, before we can design a control program we need an understanding of where the threatened resources are found, and how much deposition reduction is needed to protect them. Much of the forest research now under way would be applicable to Canada to some degree. However, the distribution of tree species and the environmental conditions of Canadian forests differ significantly from those of most U.S. forests being studied. Therefore, additional work either by Canadian scientists or by the U.S. would be needed, even after the research program described above had been completed, and even assuming it demonstrated a quantitative link between acid deposition and forest damage, before EPA could reasonably determine that a given action under section 115 would adequately prevent or eliminate damage to Canadian forests.

c. We do have a qualitative understanding that acid deposition causes materials damage. However, several unanswered questions make it difficult to apply this qualitative understanding to the actual design of a section 115 control program.

Acid deposition exists in several forms: as wet deposition in the form of rain, snow, or fog or as dry deposition in the form of sulfate and nitrate particulates or as gaseous $SO_2$ deposited onto the surface of materials. The extent to which acid deposition causes materials damage appears to vary from material to material, from one form of deposition to another, and from one mechanism of exposure to another. For any given exposure site, each different type of deposition is likely to have different dominant sources found at different distances from the damaged material. This makes it extremely difficult to determine the relative importance of local and distant sources in causing materials damage. Similar problems arise in determining acid deposition damage to surface waters and forests.

In addition, there are very limited data on the rate at which various materials react to acid deposition. To determine a reliable quantitative measure for the effect of deposition on any particular material requires several years of exposure and testing. Such work is now under way to determine dose response functions for a number of common materials but analytically useful results from this research will take an additional one to four years.

When this knowledge is available, to apply it will require a quantitative understanding of the total amount of materials being exposed and where they are located. Such a materials inventory is being developed for the U.S. However, to the best of my knowledge no such inventory exists or is being developed for Canada.

Both a dose response function for affected materials and a materials inventory would be needed to determine the extent of any emission reduction in the United States needed to prevent or eliminate damage to materials in Canada.

d. In addition to surface waters and forests, we have attempted to evaluate the impact of acid deposition on

agricultural crops and on human health. To date our findings have failed to confirm or establish any significant or widespread effects. To make a definite determination that no significant damage is occurring in either of these areas would be difficult and protracted because of the inherent scientific difficulty of proving a negative.

e. The Goverment's effort to find answers as quickly as posisble to these and other acid deposition questions has been significantly expanded in the past few years. In 1982 $17.4 million was budgeted for this research, in 1983 $22.3 million, in 1984 $27.6 million, in 1985 $64.9 million, and in 1986 $85 million. In consequence the rate of progress has been determined primarily by the inherent time limits needed to conduct scientific research and not by lack of budgetary support. There therefore seems to be little that can be done in the near term to significantly increase the rate of scientific progress. We also lack the ability to accurately predict when we will answer the questions that are now open since that itself also depends on the nature and outcome of the current research program.

The existing regulatory task most closely analogous to the establishment of levels of harm under section 115 is the establishment of national ambient air quality standards under section 109 of the Clean Air Act. That section, like section 115, requires EPA to define pollution levels needed to protect public health and welfare. The establishment of such standards is one of the most intricate and resource-intensive tasks that the Clean Air Act assigns to EPA due to the complexity and often to the incompleteness of the scientific data involved. No ambient air quality standard has ever been issued in final form less than two years after a definite decision to proceed with developing it. Even where aquatic damage is concerned, the scientific information on acid rain damages is not comparable to the information used to make decisions on air quality standards.

*Long-Range Modelling*

9. To design a control program under section 115 requires not just defining target levels of pollution in Canada, but also relating emissions in the United States quantitatively to Canadian target levels. That can only be done by the use of mathematical models that simulate the movement and the chemical transformation of pollutants in the atmosphere over long distances.

EPA has consistently concluded that models such as these do not yet produce results that are reliable enough to be used in developing regulatory programs. 49 Fed. Reg. 34751, 34863 (1984). Our understanding of the chemical reactions that form acid deposition, the ways such reactions actually might take place in the atmosphere, and the way the various pollutants involved might be transported over hundreds of miles under different weather conditions is too limited to serve as a foundation for models with acceptable quantitative specificity.

A specific aim of research under the Acid Precipitation Act of 1980 is to advance the development of acid deposition models. The Regional Acid Deposition Model (RADAM) now under development by the National Center for Atmospheric Research under contract to EPA represents the most intensive such pollutant modeling effort ever undertaken. It was started in 1983 and is scheduled to advance to the testing stage in 1987. Its estimated development cost is $5 million, not including an estimated $20 million that will have been spent on atmospheric research to provide the model with its scientific bases. We currently estimate that after testing begins full evaluation of the model would require approximately two years to complete at a cost in excess of $30 million. Given the magnitude of the task and the high priority already assigned to it, there is once again no realistic possibility of accelerating this schedule by assigning more resources to it.

*Allocating Reduction Requirements*

10. The final step in designing an acid rain control program is to use such acid rain models as may eventually prove suitable, together with the target deposition levels, to calculate for each state that receive a section 115 notice exactly what its total emission reduction must be. None of the existing Clean Air Act programs calls for such an allocation of emission reduction obligations, and EPA therefore has no experience in designing or implementing such an allocation program.

Designing such an allocation program would be a major and complicated analytic task even after all the scientific questions had been answered. It is far more complicated given the pervasive uncertainty in both these fields.

Beyond that, even a perfect scientific understanding would not solve the question of allocation. Because acid deposition is a regional phenomenon, involving the combined emissions of hundreds of individual sources, there are many different ways of reducing these emissions that produce the same environmental effect. A reduction of one million tons from State A and one and a half million from State B may be the equivalent—as far as impact on Canada is concerned—of a reduction of two million tons from State A and one million from State B.

Scientific research by itself cannot answer which of the technically acceptable allocations EPA should select. The statute likewise fails to specify either an allocation method or the factors that EPA should consider in deciding on one. This lack of guidance means that a wide variety of possible allocation methods will have to be considered. Even the most obvious rules for choosing an allocation method—for example, an allocation that minimizes control costs, or one that minimizes social disruption—will be expensive and difficult to evaluate, particularly given the number of sources involved, and are potentially in conflict with each other.

In my view there is no chance that States will develop satisfactory plan revisions under section 115 unless EPA specifies an allocation of emission reductions among them. Absent this, each state will be under great pressure to develop its revisions based on allocation assumptions that minimize its control requirements, with the result that as a whole the state plans will produce fewer emission reductions than a national analysis would indicate is called for.

Emission reduction obligations cannot be allocated among states until the tools needed to calculate them—deposition target levels in Canada, long range atmospheric models, and the standards for allocating emission reduction obligations—have been developed and the problem has been fully analyzed through their use. Moreover, the results will only be acceptable to those who would be bound by them if they are developed with a full opportunity for public comment, and will only be legally binding if they are promulgated as rules. Finally, it is certain that each step of EPA's reasoning and analysis in deriving allocation levels will be subject to detailed public comment.

A major rulemaking involving issues of this complexity cannot be completed in less than a year and a half after the supporting technical work needed to write it has been fully completed.

11. It is impossible to say with confidence when the open scientific questions that must be answered before an acceptable control program can be devised will in fact be answered. The research program described earlier for deriving answers to these questions had set out what responsible scientists believed to be the most efficient approach for deriving scientifically respectable answers. If EPA were to pull together the incomplete results of ongoing studies without waiting for any significant improvement in our current state of knowledge there could be no assurance that an acceptable control program could

be based on these incomplete results. In any event between one and a half and two years will be necessary even to assemble the existing data. As stated earlier, rulemaking to embody the results in a legally binding form, assuming the information provided the foundation for such a step, will take a minimum of another year and a half.

11. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on September 9, 1985

/s/ Charles L. Elkins
CHARLES L. ELKINS